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CASES

ON

INTERNATIONAL LAW

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

EDITED

WITH SYLLABUS AND ANNOTATIONS

BY

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"*War and Peace divide the business of the world*"

DR. JOHNSON

BASED ON THE LATE DR. FREEMAN SNOW'S CASES AND OPINIONS ON INTERNATIONAL LAW

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TO

ANDREW SLOAN DRAPER, LL.D.

PRESIDENT OF THE UNIVERSITY OF ILLINOIS

FORMERLY JUDGE OF THE COURT OF COMMISSIONERS OF ALABAMA CLAIMS

A PRUDENT COUNSELLOR, A LOYAL FRIEND

THE SOUL OF HONOR

PREFACE.

THE present book was intended to be a revision of the late Dr. Snow's Cases and Opinions on International Law, published in 1893. The changes made in the course of revision were, however, so many and so radical that it seemed advisable to the publisher to issue it as an independent work, and it so appears. The arrangement closely follows Dr. Snow's; in fact, it is identical with it in most respects. His text has been utilized so far as possible; his notes have generally been retained and enlarged, and the Syllabus has been thoroughly revised and remade. Much of the merit — if any there be — justly belongs to Dr. Snow, but the present editor is responsible for the undertaking as a whole.

The idea underlying this volume is that international law is part of the English common law; that as such it passed with the English colonists to America; that when, in consequence of a successful rebellion, they were admitted to the family of nations, the new republic recognized international law as completely as international law recognized the new republic. Municipal law it was in England; municipal law it remained and is in the United States. No opinion is expressed on the vexed question whether it is law in the abstract; our courts, State and Federal, take judicial cognizance of its existence, and in appropriate cases enforce it, so that for the American student or practitioner it is domestic or municipal law.

If English and American courts of justice enforce international law, and have repeatedly done so in the past two centuries, there must be, and, in fact, there is, a mass of judicial decision on this subject. There should be the same reason for respecting precedent in this as in other branches of the law; and beyond doubt in suits involving a question of international law a case in point is cited and followed, unless overruled or distinguished from the case under consideration. Judicial decisions, then, are an important and indispensable source of authority in international law.

It is the judgment that is authoritative, although the *obiter dictum* of a distinguished judge is entitled to respect. The opinion of a text-book writer is valuable; but, like the *dictum*, it is not in itself law. It is at best a statement of the underlying principle of the law or a digest or summary of cases on the subject with which the text-book deals. The opinions of diplomats likewise carry great weight; but the diplomatist does not and cannot consider the question at issue with the impartiality of a judge, for he is influenced by the interests of his country.

For these reasons the cases here printed have been selected from the reported decisions of English and American courts; and opinions of text-book writers and extracts from diplomatic correspondence, though cited in the Syllabus and foot-notes, do not appear in the text.

The purpose of the Syllabus is to round out the principles developed and established in the text. It cites the cases and also refers to the authoritative writers of England, America, and the continent. In this way not only the international law of the courts, but even matters of comity and ceremony, are treated. References are made in well-nigh every section to Bonfils (1901) and to Rivier's French (1896) and German (1899) treatises; and very frequently to Calvo, Heffter, and Liszt.

To Bonfils' treatise, of which the third and last edition, admirably edited by M. Fauchille, appeared in 1901, the references are to sections, so that they are applicable to any edition. This work, a masterpiece as to conception and execution, is peculiarly rich in references to continental literature in book and magazine form. The same remark applies to Rivier's French and German treatises, and in a less degree to Liszt's, of which a second edition appeared in 1902. Rivier, a French Swiss, recognizes the importance of the German authorities, and is not affected by the prejudice of nationality. Liszt naturally refers to the latest and leading German authorities, and it is for this reason that German works and treatises—for example, v. Holtzendorff's "Handbuch des Völkerrechts"—are not specifically referred to in the Syllabus. For the magazine literature of the English-speaking world, citations are given to Jones' Index to Legal Periodicals, 2 vols. (1887, 1899).

It is hoped, therefore, that the book will serve, not only as a text for present, but also as a guide for future study.

In conclusion, the writer wishes to thank Professor Beale, of the Harvard Law School for his generous permission to use a section from his "Cases on the Conflict of Laws;" and he desires especially to thank his friend and pupil, Wesley E. King, Esq., of the Champaign (Ill.) bar, and his colleague, William C. Dennis, Esq., for valuable help in the preparation of the Syllabus.

JAMES BROWN SCOTT.

University of Illinois,
October 15, 1902.

TABLE OF CONTENTS.

PAGE

TABLE OF CASES xiii

SYLLABUS xxiii

INTRODUCTION.

§ 1. International Law is a Part of the Municipal Law of States . . . 1

PART I.

INTERNATIONAL RELATIONS IN TIME OF PEACE.

CHAPTER I.

STATES — TERRITORIAL RIGHTS.

§ 2. (*a*) Definition and Character of Sovereign States 23
(*b*) Recognition of the Existence of a State 37
(*c*) Kinds of States 45
§ 3. Acquisition of Territory 70
§ 4. Boundaries 75
§ 5. Change of Sovereignty 85
(*a*) Effect on Public Rights and Obligations 85
(*b*) Effect on Private Rights 95
(*c*) Effect on Law 104
§ 6. Territorial Waters of a State 116
(*a*) Rivers 116
(*b*) Straits and Lakes 132
(*c*) Bays 143
(*d*) Marginal Seas 154

CHAPTER II.

TERRITORIAL JURISDICTION.

§ 7. Rights, Privileges, and Immunities of Foreign Sovereigns 170
(*a*) Right of Foreign Sovereign to Sue in Courts of Foreign State . 170
(*b*) Immunity of Foreign Sovereigns from Suit 180
§ 8. Immunities of Diplomatic Agents 189

PAGE
§ 9. Immunities of Public Ships 208
(a) Ships of War 208
(b) Other Public Ships 220
§ 10. Merchant Vessels 225
§ 11. Right of Asylum 256
(a) In Legations 256
(b) On Board Ships of War 258
(c) On Board Merchant Ships 264
§ 12. Extradition — Interstate Rendition 274
§ 13. Jurisdiction of Offences committed Abroad 294
§ 14. Extraterritorial Acts by Order of the State 305
§ 15. Extraterritorial Acts done by a State, in Self-Defence 308
§ 16. Injury to Foreigners by Mob Violence 320

CHAPTER III.

JURISDICTION ON THE HIGH SEAS.

§ 17. Merchant Vessels 329
§ 18. Municipal Seizures beyond the Three-Mile Limit 343
§ 19. Piracy 345

CHAPTER IV.

NATIONALITY.

§ 20. Indelible Allegiance — Expatriation 370
§ 21. Citizenship — Naturalization 376
§ 22. Status of American Indians 398
§ 23. Treaties the Law of the Land 412

PART II.

International Relations as Modified by War.

CHAPTER I.

MEASURES SHORT OF ACTUAL WAR.

§ 24. Reprisals 451
§ 25. Hostile Embargo 460
§ 26. War: Purpose and Declaration 464

CHAPTER II.

EFFECTS OF WAR AS BETWEEN ENEMIES.

§ 27. Enemy's Property within the Territory and Debts due to the Enemy 481
§ 28. Private Contracts 498
§ 29. Trade with the Enemy 521
§ 30. Duty of Subject or Citizen to come Home on Outbreak of War . . 556

PAGE
§ 31. Ransom Bills and Permissible Trading 566
§ 32. Commercial Domicile 585
§ 33. Ownership of Goods in Transit 607
§ 34. Transfers in Transitu 616
§ 35. Freight and Liens 629
§ 36. Recapture — Rescue 649
§ 37. Hostile Occupation, Conquest, and Cession 655
§ 38. Termination of War 675

CHAPTER III.

RELATIONS BETWEEN BELLIGERENTS AND NEUTRALS.

§ 39. Belligerent Capture in Neutral Waters 684
§ 40. Equipment of Vessels of War in Neutral Territory 692
§ 41. Aid to Insurgents 721
(*a*) Loan of Money 721
(*b*) Ship, Munitions, and other Supplies 731
§ 42. Contraband of War 760
§ 43. Despatches and Persons as Contraband 780
§ 44. Blockade 796
§ 45. Rule of the War of 1756 845
§ 46. Continuous Voyages 848
§ 47. Visit and Search: Neutral Property on the High Seas 858
§ 48. Prize Courts 889

INDEX-DIGEST 935

TABLE OF CASES.

Principal cases are in *italics*.

	Page
Abd-ul-Messih *v.* Farra	53
Abell *v.* Penn. Mutual Life Ins. Co.	516
Abo, The	605
(La) Abra Silver Mining Co. *v.* United States	449
Acteon, The	530
Adams *v.* Akerlund	426
Adela, The	689, 690
Admiral, The	820
Adula, The	826
Advocate-General *v.* Ranee S. Dossee	106
Aertsen *v.* Ship Aurora	233
Ah Kee, *In re*	255
Ah Sing, *In re*	333
Airhart *v.* Massieu	97, 105
Alabama Claims and Award, 1872	713
Albemarle, The	899
Alerta, The	705
(Mrs.) Alexander's Cotton	495, 534, 536, 605, 762
Alfred, The	705
Alire's Case	475
Alleganean, The	143
Amédie, The	369
American Ins. Co. v. *Canter*	657
Amiable Isabella, The	427
(La) Amistad de Rues	705
Amory v. *McGregor*	561
Amy Warwick, The	62, 480
(L') Anemone	228
Ann Green, The	494
Ann Green, The	620
Anna, The	74
Anna, The	684
Anna Catharina, The	612
Anna Maria, The	910
Anne, The	688
Antelope, The	28, 369, 860
Anthon *v.* Fisher	570
Antoine *v.* Morshead	536, 541
Antoine v. *Morshead*	573
Antonia Johanna, The	604
Antonia Johanna, The	632
Apollo, The	776
Apollon, The	344
Appollon, The	909
Ariel, The	628
Armstrong *v.* United States	674
Arnold *v.* United States Ins. Co.	205
Arrogante Barcelones, The	705
Astor *v.* Hoyt	109
Astrea, The	655
Atalanta, The	780
Atalanta, The	894
Atlas, The	895
Attorney-General *v.* Weedon & Shales	487
Aubrey, *In re*	239, 437, 451
Baigorry, The	820
Bain v. *Speedwell*	675
Baiz, *In re*	6
Baiz, In re	197
Baldy *v.* Hunter	61
Baltica, The	605, 628, 629, 802
Barbuit's Case	205
Barclay *v.* Russell	488
Barnett *v.* Barnett	97
Barton Co. *v.* Newell	538
Bas *v.* Tingy	471, 654
Beaver, The	653
Bedel *v.* Loomis	76
Beers v. *Arkansas*	186
Behrensmeyer *v.* Kreitz	396
Belgenland, The	338
Bell, The	655
Bell *v.* Chapman	536
Bell *v.* Reid	604
Bello, The	655
Bello Corrunes, The	705
Bellona, The	655

	Page
Belnap *v.* Schild	189
Benito Estenger, The	621
Bentzen *v.* Boyle	22, 536
Bentzen v. *Boyle*	598
Bermuda, The	857
Berne, City of, *v.* Bank of England	38
Betsey, The	798
Betsey, The	705, 899
Betsy, The	895, 929
Bigelow *v.* Nickerson	142
Blair v. *Silver Peak Mines*	376
Blanford *v.* The State	282
Blankard v. *Galdy*	104
Boedes Lust, The	460
Boedes Lust, The	553
Booth *v.* L'Esperanza	652
Botiller *v.* Dominguez	426
Boussmaker, Ex parte	494
Boussmaker, *Ex parte*	536
Boyd *v.* Thayer	395, 401
Bragg *v.* Tuffts	521
Brandon *v.* Cushing	553
Brig Joseph, The	536
Brig Juno, The	251
Brig Sea Nymph, The	869
Briggs *v.* The Light Boats	189, 225
Brothers, The	705
Brown *v.* Duchesne	186
Brown *v.* Gardner	538
Brown *v.* Hiatts	503, 516, 541, 683
Brown v. *United States*	486
Brown *v.* United States	494, 499, 536
Browning *v.* Browning	97
Brunswick, Duke of, *v.* King of Hanover	179, 182
Bryant *v.* United States	436
Buchanan *v.* Curry	516, 541
Buena Ventura, The	465, 499
Burley's Case	293
Buron v. *Denman*	305
Buron *v.* Denman	307
Bush *v.* Bell	530
Butternuth v. *St. Louis Bridge Co.*	121
Byrne *v.* Herran	192
Caldwell *v.* Van Vlissengen	186
Caldwell's Case	282
Calvin's Case	381
Camelo *v.* Britten	530
Camille, *In re*	396
Capen *v.* Barrows	536
Carlisle *v.* United States	397
Carlos F. Roses, The	637
Carlotta, The	650
Carneal *v.* Banks	420
Carolina, The	584, 585
Caroline, The	317
Caroline, The	319, 787
Caroline Wilmans, The	910
Carr *v.* United States	189
Carrington v. *Merchants' Ins. Co.*	769
Case *v.* Terrell	189
• *Castioni*, In re	285
• Castioni. *In re*	293
Cazo's Case	293
Chappell v. *Jardine*	108
Charkieh, The	48
Charkieh, The	219
Charlotte, The	152, 901
Charlotte *v.* Chouteau	97
Charming Betsey, The	22
Charming Nancy, The	568
Chavasse, *Ex parte*	779
Chavez *v.* Chavez de Sanchez	97
Cherokee Nation *v.* Georgia	37, 53
Cherokee Tobacco, The	420, 426
Cherriot *v.* Foussat	480
Cheshire, The	820
Chin King, Ex parte	379
Chinese Exclusion Case	413, 432
Chirac *v.* Chirac	419
Choctaw Nation *v.* United States	427
Christie *v.* Secretan	926
Christina Maria, The	776
Church v. *Hubbart*	343
Circassian, The	820, 828
Clarke *v.* Cretico	205
Clarke *v.* Morey	541, 545
Clayton *v.* Ship Harmony	654
Cloete, *In re*	196
Clypso, The	895
Coffee *v.* Grover	85
Coleman *v.* Tennessee	212
Columbia, The	820
Commercen, The	632
Commercen, The	765
Commonwealth *v.* Blanding	300, 301
Commonwealth v. *Blodgett*	308
Commonwealth *v.* Chapman	106
Commonwealth *v.* Hawes	282
Commonwealth *v.* Kosloff	205
Commonwealth *v.* Macloon	300
Comte de Wohrougoff, The	524
(La) Conception	705
Conn *v.* Penn.	516, 541
Constitution, The	218
Constitution, The	219, 220, 919
Contzen *v.* United States	396
Cooley v. *Golden*	129
Coolidge *v.* Inglee	536

Page

Coolidge *v.* Payson 573
Cooper, *In re* 76
Coppell *v.* Hall . . . 205, 520, 534, 541
Corier Maratimo, The 909
Cornet *v.* Williams 521
Cornu v. *Blackburne* 566
Costa Rica Packet, The 462
Craemer *v.* Washington 436
Crapo *v.* Kelley 331, 333, 788
Crawford v. *The William Penn* . . 575
Crawford & McClean v. *The William Penn* 580
Creole, The 252
Creole, The 255
Cross *v.* Harrison 105, 658
Cross *v.* Talbot 191
Curlew, The 901
Cushing, Adm'r, v. *United States* . 929
Cutting's Case 301

Daifjie, The 585
Dainese *v.* Hale 237
Dainese *v.* United States 237
Dalgleish v. *Hodgson* 926
Danckebaar Africaan, The . . . 604
Daniel *v.* Hutchinson 63
Darby v. *The Brig Erstern* . . . 896
Dashing Wave, The 820
Daubuz *v.* Morshead 575
Davis *v.* The Police Jury 421
DeBode *v.* Regina 400
Deergaden, The 524
De Haber v. *Queen of Portugal* . . 180
De Jarnet v. *De Giversville* . . . 542
De Lima *v.* Bidwell 674
Dennison *v.* Imbrie 516, 541
Derby, Case of Earl 105
Dewey *v.* United States 899
Dewing *v.* Perdicaries 521
De Wutz v. *Hendricks* 721
Diana, The 632
Diligentia, The, ... 655, 674, 689
Dillon, *In re* 192, 481
Dobree *v.* Napier 309, 480
Doe *v.* Braden 427
Dole *v.* Merchant's Mutual Marine Ins. Co. 350
Dole v. *Merchant's Mutual Marine Ins. Co.* 470
Don Pacifico, Case of . . . 328, 461
Donaldson *v.* Thompson 925
Dooley *v.* United States 674
Dorothy Foster, The 655
Dos Hermanos, The 895
Douglas *v.* United States 541

Page

Dow, Neal, *v.* Johnson . . . 212, 666
Downes *v.* United States 674
Driefontein, etc., Mines, Lim., *v.* Janson 553
Dunham *v.* Lamphere 153
Dupont *v.* Pichon 208

Edward, The 765
Eenigheid, The 524
Eenrom, The 895
Elector of Hesse Cassel's Case . . 675
Eliza Ann, The 689
Eliza Cornish, The 820
Elizabeth, The 524
Elk v. *Wilkins* 398
Ellis v. *Mitchell* 234
Elwine Kreplin, The 237
Emancipation Cases, The 521
Emanuel, The 847
Embden's Case 399
Emily St. Pierre, The 655
Emperor of Anstria *v.* Day & Kossuth 178, 179
Emperor of Brazil, The 179
Emulous, The 536
Endraught, The 766
Enterprise, The 255
Estrella, The 690, 705, 901
Etrusco, The 689, 690
Evert, The 776
Exchange, Schooner, v. *McFaddon* . 208
Exchange, Schooner, *v.* McFaddon 251, 263, 318
Exposito *v.* Bowden 536
Express, The 930
Ezeta, *In re* 293

Fairfax's Devisees *v.* Hunter's Lessee 420
Falcon, The 926
Fama, The 421
Fanny, The 705, 894
Fay *v.* Montgomery 909
Feather *v.* The Queen 309
Feise *v.* Thompson 530
Felicity, The 910
Fifield *v.* Insurance Co. . . 44,61, 350
Fifty-two Bales Cotton 565
Filor's Case 541
Fiott *v.* Commonwealth 432
(Die) Fire Damer 910
First Nat. Bank v. *Kinner* 106
Fisher *v.* Begrez 196
Fisher *v.* Krutz 541
Flad Oyen, The 919
Flad Oyen, The 925

	Page
Fleming v. *Page*	659
Flindt v. *Crockatt*	526
Flindt v. *Scott*	526
Florida, The	690
Flying Scud, The	605
Folliott *v.* Ogden	304, 487
Fong Yue Ting v. *United States*	382
Fong Yue Ting *v.* United States	413
Forbes v. *Cochrane*	258
Ford *v.* Surget	61, 62
Fortuna, The	256, 369, 524, 631, 895
Foster & Elam *v.* Neilson	44, 77, 84, 390, 420
Foster & Elam v. *Neilson*	75, 412
Fourteen Diamond Rings v. *United States*	667
Fox *v.* Southack	428, 432
Foxcroft & Galloway *v.* Nagle	500
Francis & Cargo	621
Franciska, The	804
Franciska, The	820
Frau Margaretha, The	765
Freedom, The	524
Freeland *v.* Walker	531
Frelinghuysen *v.* Key	435, 449
Freundschaft, The	494, 604
Fretz *v.* Stover	516
Friendship, The	787, 788
Furtado v. *Rodgers*	549
Furtado *v.* Rodgers	553
Gage, The	655
Gamba *v.* Le Mesurier	553
Garcia *v.* Lee	76, 97
Gardner *v.* Heartt	109
Garland *v.* Davis	817
Gates *v.* Goodloe	565, 666
General Armstrong, The	687
General Pinckney, The	495
Geofroy v. *Riggs*	413
Georgia, The	629
Gerasimo, The	605
Gerasimo, The	811
Gibbons *v.* Livingston	429
(La) Gloire	585
Goede Hoop, The	531
Goodman *v.* McGehee	520, 521
Goodrich & De Forest v. *Gordon*	571
Graaf Bernstorf, The	895
Gran Para, The	705
Grange, The	690
Grapeshot, The	666
Gray, Administrator, v. *United States*	452
Gray, Administrator, *v.* United States	471
Gray Jacket, The	565
Grazebrook, *In re*	779
Griswold *v.* Waddington	520, 536, 541
Griswold v. *Waddington*	504
Grossmayer's Case	481
Grover *v.* Carter	541
Guadalupe Co. *v.* Wilson Co.	76
Guerin, Case of	674
Guidita, The	524
Guiteau's Trial	196
Haabet, The	776
Hall *v.* Root	97
Hallet *v.* Brown	577
Hamilton *v.* Dillin	534
Hamilton v. *Eaton*	481
Hanauer *v.* Doane	520, 521
Hanauer *v.* Woodruff	521
Handly's Lessee v. *Anthony*	116
Handly *v.* Anthony	84, 116
Hanger v. *Abbott*	500
Hanger *v.* Abbott	468, 534, 536
Harcourt v. *Gaillard*	70
(Le) Hardy *v.* La Voltigéante	605
Harmony, The	585
Harrison *v.* Meyer	666
Harrold *v.* Arrington	76, 77
Hatch *v.* Baez	182
Hauenstein *v.* Lynham	419, 426
Hausding's Case	399
Havelock *v.* Rockwood	926
Haver v. *Yaker*	420
Haymond *v.* Camden	548
Head Money Cases	413, 426
Heathfield *v.* Chilton	6
Heathfield v. *Chilton*	189
Heirn v. *Bridault*	1
Helen, The	665, 779
Helen, The	821
Helena, The	45
Helena, The	2
Henderson's Case	585
Henrick and Maria, The	820
Henry, The	655
Herman, The	605
Hermosa, The	255
Hibbs, *Ex parte*	282
Hickman *v.* Jones	521
Hoare v. *Allen*	498
Hoare *v.* Allen	541
Holmes, *Ex parte*	282
Holmes *v.* Jennison	282
Home Insurance Co.	59
Honduras, Republic of, v. *Marco A. Soto*	24

	Page
Hoop, The	521
Hoop, The	524, 536, 570
Hooper, Administrator, v. *United States*	433, 633
Hooper, Administrator, *v.* United States	459, 460, 900, 909
Hopkins *v.* De Robeck	192
Hopner *v.* Appleby	652
Horner *v.* United States	413
Huascar, The	352
Hubbard *v.* Hornden Express Co.	482
Hubbell *v.* United States	462
Hudson *v.* Guestier	344, 925
Hughes *v.* Cornelius	926
Hughes *v.* Edwards	420
Hullett *v.* King of Spain	87
Hunt's Heirs *v.* Hunt	520
Hurtige Hane, The	3
Hutchinson *v.* Brock	536
Huus *v.* New York and Steamship Co.	674
Imina, The	776
Immanuel, The	845
Indian Chief, The	205
Indian Chief, The	588
Ingliss *v.* Trustees	45
International, The	762, 780
(L') Invincible	653
Invincible, The	705, 925, 926
Isaacs, Taylor & Williams v. *City of Richmond*	521
Itata, The	344, 740
Jackson *v.* Willard	109
James G. Swan, The	76
Jan Frederick, The	553
Jan Frederick, The	618
Jecker v. *Montgomery*	664
Jecker *v.* Montgomery	534, 536, 909
Jenks *v.* Hallet & Brown	577
Jennings *v.* Carson	11
(*La*) *Jeune Eugénie*	3
Johan Pieter, The	531
Johanna Emilie, The	464, 498
Johanna Maria, The	803
John and Jane, The	655
John Gilpin, The	566
Johnson *v.* Jones	666
Johnson v. *McIntosh*	71
Johnson *v.* 21 Bales	2
Jones *v.* Garcia del Rio	38
Jones *v.* Leonard	285
Jones *v.* Mehan	427
Jones v. *United States*	38
Jones *v.* United States	74
Jonge Margaretha, The	762
Jonge Margaretha, The	780
Jonge Pieter, The	820
Jonge Tobias, The	766
Josefa Segunda, The	652
Joseph, The Brig	556
Juffrow Louisa Margaretha, The	524
Juffrow Maria Schroeder, The	804
Julia, The	820
Junge Klassina, The	605
Juniata, The	494
Kansas Indians	427
Keene *v.* McDonough	63
Keir *v.* Andrade	530
Keith v. *Clark*	28
Kennett v. *Chambers*	723
Kensington *v.* Ingliss	531
Kentucky *v.* Dennison	285
Kerskaw v. *Kelsey*	535
Kestor, The	273, 413
Ketcham *v.* Buckley	61, 113
Ketland *v.* The Cassius	700
Kierlighett, The	926
King of Greece, The	179
King of Prussia, The, *v.* Küpper	173
King of Spain, The	179
King of Spain *v.* Hullet & Widder	178, 179
King of Spain *v.* Machado	170
King of Spain *v.* Oliver	179
King of the Two Sicilies *v.* Willcox	87
Kingsbury's Case	285
Kinkead *v.* United States	97
Kirk *v.* Lynd	899
Knox *v.* Lee	521
Kortright *v.* Cady	109
Koszta's Case	400, 401
Lady Jane, The	524
Lafayette, The	932
Lagarve's Case	282
Lamar *v.* Brown	495
Lamb *v.* Davenport	116
Lamington, The	332, 342
Lane County *v.* Oregon	27, 44
Lascelles *v.* Georgia	285
Lee Joe v. *United States*	382
Leevin *v.* Cormac	531
Lem Moon Sing *v.* U. S.	399
Leitensdorfer *v.* Webb	97, 665
Lem Moon Sing *v.* United States	399
Leucade, The	910
Levy *v.* Stewart	504

Page

Lilla, The 62, 494, 655, 689
Lindo *v.* Rodney 463
Lisette, The 778, 820
Littell v. *Erie R. R. Co.* 378
Little *v.* Barreme 817
Little *v.* Watson 97
Lively, The 909
Lockwood *v.* Dr. Coysgarne . . . 196
Lola, The 19
Lone, The 655
Lord Nelson, The 655
Lottawanna, The 12
(*Le*) *Louis* 352
(Le) Louis 860
(La) Louisa 820
Luther *v.* Borden 44

McCargo *v.* N. O. Ins. Co. 255
Macartney *v.* Garbutt 196
McCulloch *v.* Maryland 44
Macdonald, Case of 370
McDonald *v.* Mallory . . . 332, 333
McIlvaine *v.* Coxe's Lessee . . . 45
McKee *v.* United States . . 534, 536
McKennon v. *Winn* 114
Macleod *v.* Attorney-General . . 304
McLeod's Case 309, 319
McVeigh *v.* Bank of Old Dominion 500
Madison, The 785
Madonna del Burso, The 3
Madrazo *v.* Willes 369
Magdalena, The 705
Magellan Pirates, The 351
Mahler *v.* Transportation Co. . . 153
Mahon *v.* Justice 285
Maissonnaire *v.* Keating . . 571, 766
Manchester *v.* Massachusetts . . . 153
Manhasset, The 12
Manhattan Life Ins. Co. v. *Buck* . 482
Manning *v.* Nicaragua 186
Marguerite, The 655
Maria, The 858
Maria, The 776, 820, 860
Marianna Flora, The 322
Marianna Flora, The 873
Marias, *In re* D. F. 666
Marks *v.* United States 475
Martin *v.* B. & O. R. R. Co. . . . 604
Martino *v.* International Life Ins. Co. 604
Mary, The 585
Mary Ford, The 652
Mary Ford, The 652, 653
Massachusetts *v.* Green 304
Matthews v. *McStea* 508
Mauran *v.* Insurance Co. 61

Page

May *v.* Speeht 97
Mechanics & Traders' Bank *v.* Union Bank 666
Mentor, The 676
Merritt *v.* Bartholick 109
Meteor, The 720
Mexico *v.* De Arrangoiz 37
Mexico v. *De Arrangoiz* 170
Mighell *v.* Sultan of Jahore . . . 181
Miller, *In re* 282
Miller *v.* The Resolution 571
Miller v. *The Resolution* (1) . . . 899
Miller v. *The Resolution* (2) . . . 906
Miller *v.* United States 61, 480, 481, 571
Milligan, *Ex parte* 666
(La) Minerve 767
Minneapolis v. *Reum* 390
Minturn *v.* Brower 97
Mitchel *v.* United States . . . 74, 97
Mitchell *v.* Harmony 495
Mitchell *v.* United States 534
Mitchell v. United States 605
(Der) Mohr 910
Mohr & Haas *v.* Hatzfeld 674
Moncan, *In re* 255, 333
Montezuma, The 351
Montgomery *v.* Ives 74
Montgomery *v.* United States 516, 538
Montijo's Case 329
More *v.* Steinbach 73
Mortimer v. *N. Y. Elevated R. R. Co.* 111
Moses, In re 396
Mouseaux *v.* Urquhart 541
Munden *v.* Duke of Brunswick . . 180
Murray *v.* Charming Betsey . 400, 909
Musson *v.* Fales 536
Musurus Bey *v.* Gadban 208
Mutual Association Society *v.* Watts 97

Nancy, The 705
Nancy, The 817
Nathaniel Hooper, The 633
Neagle, *In re* 400
Neal Dow *v.* Johnson . . . 212, 666
Neely *v.* Henkel 53, 675
Neptunus, The 796
Neptunus, The 804
Nereide, The 884
Nereide, The 22, 322, 338, 437, 451, 894
Nereyda, The 705
Neustra Señora de los Dolores, The . 681
Neutralitet, The 767
New Chili Gold Mining Co. *v.* Blanco 207
New Orleans Mob 328
New Orleans Riot 329

	Page
New Orleans v. *Abbagnato*	320
New Orleans *v.* Steamship Co.	666, 674
New York Indians *v.* United States	104, 427
New York Life Ins. Co. *v.* Davis	516
New York Life Ins. Co. v. *Seyms*	512
New York Life Ins Co. v. *Stathem*	512
Newfoundland, The	835
Nicnol *v.* Goodall	901
Nicholas *v.* United States	189
Nigel Gold Mining Co., Lim., *v.* Hoode	604
(*La*) *Ninfa*	443
Nitchencoff's Case	197
Nuestra Señora de Regla	909
Nymph, The	677
Oakes *v.* United States	61, 899
Ocean, The	566
Ocean, The	819
Oddy v. *Bovill*	924
Odin, The	152
Olinde Rodrigues, The	835
O'Neal *v.* Boone	504
Ornelas *v.* Ruiz	436
Orozembo, The	785
Orr *v.* Hodgson	420
Ortiz, *Ex parte*	74
Osborn *v.* U. S. Bank	399
Ostee, The	681
Ouachita Cotton, The	534, 536
Packet de Bilboa, The	609
Page *v.* Lennox	926
Page's Case	487
Palmer *v.* Lorillard	632
Panaghia Rhomba, The	800
Panama, The	474, 475
Panama, The	788
Paquette Habana, The	19
Parkinson v. *Potter*	192
Parlement Belge, The	220
Parlement Belge, The	221
Paton *v.* Nicholson	536
Patrixent, The	569
Paul *v.* Christie	541
Peach v. *Bath*	6
Pearl, The	820
Pelican, The	40
Penhallow *v.* Doane	11, 26, 36
Pennsylvania, The	654
People *v.* Curtis	282
People *v.* Gerke & Clark	420
People *v.* McLeod	309
Pequinot *v.* City of Detroit	396
Perkins v. *Rogers*	554
Perle, The	688
Peru *v.* Dreyfus	38
Peru *v.* Peruvian Guano Co.	38
Peterhoff, The	760
Peterhoff, The	820, 857
Philips *v.* Hatch	683
Phœbe Ann, The	705
Pious Fund, The	449
Polly, The	655
Potts v. *Bell*	525
Potts *v.* Bell	536, 541, 563, 580
Power *v.* Lester	109
President, The	566
Pridgeon *v.* Smith	521
Prins Frederik, The	220
Prioleau v. *United States & Johnson*	173
Prischell *v.* Allnut	530
Prize Cases, The	475
Prize Cases, The	601
Prize Cases, The	62, 480, 481, 534, 536, 820
Protector, The	682
Providence, The	655
Prussian Subject's Case	399
Purissima Conception, The	689
Queen *v.* Keyn	19
Queen v. *Keyn*	154
Queen of Portugal, The	179
R. *v.* Serva & others	860
Ranger, The	705
Ransom *v.* Alexander	521
Rapid, The	557
Rapid, The	782
Reform, The	534
Reggel, *Ex parte*	285
Regina v. Anderson	331
Regina v. Lesley	337
Regina *v.* Lopez	336
Regina *v.* Sattler	336
Reliance, The	230
Respublica *v.* De Longchamps	196
Rex *v.* Dix	282
Rhode Island *v.* Massachusetts	74
Ricord *v.* Bettenham	536, 568
Ringende Jacob, The	524, 766, 776, 780
Roberts *v.* Cocke	500
Rodgers *v.* Bass	541
Rodriguez, *In re*	396
Rolla, The	309, 804
Rose *v.* Himely	344, 480
Rose in Bloom, The	584
(La) Rosina	585
Ross, In re	238

	Page
Rothschild *v.* Queen of Portugal	178
Roussin *v.* Parks	97
Rucker's Case	585
St. Alban's Raid	293
St. Lawrence, The	494
St. Lawrence, The	559
St. Louis, The	524
St. Nicholas, The	895
Saito, *In re*	386
Sally, The	607
Sally, The	699, 895
Salvador, The	743
San Jose Indiano, The	605
San Jose Indiano, The	614
San Juan Baptista, The	910
Sanborn *v.* Vance	97
Santa Cruz, The	649
Santissima Trinidad, The	701
Santissima Trinidad, The	263, 480, 720, 779
Sapphire, The	178
Sarah, The	899
Sarah Christina, The	766, 775, 780
Sarah Starr, The	495
Sarah Starr & Cargo	566
Scholefield & Taylor *v.* Eichelberger	580
Schooner John, The	677
Schooner Nancy, The	861
Schooner Sophie, The	682
Schooner Washington, The	153
Schultze *v.* Schultze	426, 443
Scotia, The	17
Scotia, The	333
Scotland, The	12
Scoville *v.* Canfield	304
Sea Lion, The	531
Sea Lion, The	534
Seagrow *v.* Parks	333
Secretary of State for India *v.* Kamachee Baye Sahiba	307
Sedulous, The	655
Semmes *v.* Hartford Ins. Co.	503, 516
Seton v. *Low*	778
Seymour *v.* Bailey	545
Shacklett *v.* Polk	541
Shanks *v.* Dupont	374, 420
Sherlock *v.* Allen	332
Ship Amazon, The, *v.* United States	884
Ship Ann Green, The	620
Ship Rose, The, v. *United States*	879
Ship Tom, The	910
Shively *v.* Bowlby	74, 153
Short Staple, The	655
Siebold, *Ex parte*	44
Siffkin *v.* Allnut	531
Siffkin *v.* Glover	531
Silesian Loan Case	461
Sir William Peel, The	690
Siren, The	648
Sitka, The	218
Slaughter House Cases	400
Slocum *v.* Mayberry	909
Sloop Betsey, The	705
Small's Administrators v. *Lumpkin's Executrix*	538
Smith *v.* Brazelton	482
Society *v.* Wheeler	604
Society for Propagation of Gospel in Foreign Parts v. *New Haven*	428
Society for Propagation of Gospel in Foreign Parts *v.* New Haven	432
Sotela's Case	273
Soult *v.* L'Africaine	687
South African Republic *v.* La Compagnie Franco-Belge	181
Sparenburg *v.* Bannatyne	605
Springbok, The	857
Sprott *v.* United States	61, 521
Staat Embden, The	765, 766, 776
Stanley *v.* Schwalby	189
State *v.* Carter	298
State *v.* Dunwell	76
State *v.* Knight	300
State v. *Patterson*	283
State *v.* Patterson	285
State *v.* Vanderpool	282
State v. *Wyckoff*	296
Steamboat Co. *v.* Chase	332
Stephen Hart, The	852
Stephen Hart, The	857
Stert, The	820
Stetson *v.* United States	143
Stewart, Case of Commodore	910
Stewart *v.* Kahn	504
Stockton *v.* Williams	74
Stovall's Administrators *v.* United States	481
Strother *v.* Lucas	97
Strousberg *v.* Costa Rico	181
Stupp, *In re*	436
Susa, The	895
Sutton v. *Sutton*	427
Swan *v.* United States	899
Swan, The James G.	76
Swineherd, The (le Porcher)	677
Talbot *v.* Jansen	705
Talbot *v.* Quman	640
Talbot *v.* Seeman	22, 471, 654

	Page
Tarbell's Case	44
Taylor *v.* Barclay	38
Taylor *v.* Morton	426
Taylor *v.* Nashville & Chattanooga R. R. Co.	666
Taylor & Marshall *v.* Beckham	44
Teresita, The	820
Terlinden v. *Ames*	436
Teschmacher *v.* Thompson	97
Teutonia, The	471
Texan Star, The	630
Texas v. *White*	25
Texas *v.* White	44, 521
Thetis, The	675
Thomas *v.* Hunter	500
Thomas Gibbons, The	901
Thompson, The	909
Thompson v. *Powles*	37
Thompson *v.* Powles	723
Thorington v. *Smith & Hartley*	53
Thorington *v.* Smith & Hartley	62
Three Friends, The	44
Three Friends, The	748
Timm *v.* Marsh	109
Titus *v.* United States	94
Tom, The Ship	910
Torladé *v.* Barrozo	208
Tousig's Case	401
Trende Sostre, The	778
Trent Case	788
Trevino *v.* Fernandez	63
Trimble's Case	293
Triquet v. *Bath*	6
Triquet *v.* Bath	191
Trois Frères, The	615
Tucker *v.* Alexandroff	218, 426
Twee Gebroeders, The	129, 687, 691
Twee Juffrowen, The	776
Twilling Riget, The	633
Two Friends, The	655
Tyler *v.* Defrees	481
Underhill v. *Hernandez*	62
Underhill *v.* Hernandez	70, 182, 309, 319
United States *v.* The Active	2
United States v. *The Active*	464
United States v. *Ambrose Light*	346
United States v. Ambrose Light	322, 350
United States *v.* Arredondo	76
United States *v.* Baker	350
United States *v.* Benner	196
United States *v.* Bennett	333, 336
United States *v.* The Betsey	899
United States *v.* Clarke's Heirs	97
United States v. *Davis*	294
United States v. *Diekelman*	264
United States *v.* Diekelman	256, 666, 762
United States *v.* Fernandez	74
United States *v.* Greathouse	482
United States *v.* Grossmayer	534, 541
United States *v.* Guillem	803
United States v. *Guinet*	695
United States *v.* Guinet	700
United States *v.* Hayward	657
United States *v.* Homeyer	494
United States *v.* Huckabee	94, 495, 521
United States v. *Jeffers*	256
United States *v.* Jeffers	275
United States v. *Kagama*	404
United States *v.* Klein	495
United States *v.* Lane	536
United States *v.* Lee	189
United States *v.* Liddle	197
United States *v.* Lucero	97
United States *v.* McRae	88
United States v. *The Meteor*	711
United States *v.* The Miranda	97
United States v. *Moreno*	666
United States *v.* One Hundred Barrels of Cement	534, 545, 757
United States *v.* Ortega	197, 208
United States *v.* Pacific R. R.	666
United States *v.* Palmer	44, 480
United States *v.* Pelican Ins. Co.	304
United States v. *Percheman*	95
United States v. *Peters*	697
United States *v.* Peterson	142
United States v. *Prioleau*	85
United States v. *Quincy*	706
United States *v.* Quincy	720
United States v. *Rauscher*	274
United States *v.* Rauscher	282, 426
United States v. *Repentigny*	98
United States v. *Rice*	655
United States v. *Richard Peters*	697
United States v. *Rodgers*	132
United States v. *Smiley*	302
United States v. *Smith*	13
United States v. *Smith*	89
United States *v.* Smith	345
United States *v.* Stevenson	494
United States v. *Texas*	76
United States *v.* Texas	116
United States v. *Trumbull*	731
United States *v.* Trumbull	751
United States v. *Wagner*	175
United States *v.* Wiggins	97
United States *v.* Winchester	899
United States *v.* Wong Kim Ark	381
Usparicha *v.* Noble	529

	Page
Van Brokelen, Case of	462
Vavasseur v. *Krupp*	182
Venus, The	591
Venus, The	494, 585
Victoria, The	524
Villasseque's Case	675
Virginia *v.* Tennessee	74
Virginius, The	320
Viveash *v.* Becker	205
(Il) Volante	767
Vrouw Anna Catharina, The	690
Vrouw Judith, The	820
Vrow Anna Catharina, The	632, 690
Vrow Henrica, The	629
Vrow Johanna, The	910
Vrow Margaretha, The	616
Wagner's Case	400
Wanstead, The	655
War Onskan, The	654
Ward *v.* Smith	516, 541
Ware *v.* Hylton	419, 420, 485, 494
Ware v. *Jones*	517
Watt's Case	282
Wheelright *v.* Depeyster	926
Whitfield *v.* United States	94, 521
Whitis *v.* Polk	520
Whitney *v.* Robertson	413, 426
Whitney v. *Robertson*	422
Wilcox *v.* Luco	206
Wildenhus's Case	225
Wilhemina, The	847
Willendson *v.* The Försöket	233
William, The	542
William, The	848
William Bagalay, The	565
Williams' Case	372
Williams' Case	374
Williams *v.* Bruffy	661
Williams v. *Marshall*	530
Williams *v.* Paine	538
Williams *v.* Suffolk Ins. Co.	654
Willison *v.* Chambers	
Willison *v.* Patterson	536
Wills *v.* State	212
Wilson v. *Blanco*	206
Wilson v. McNamee	329
Wilson *v.* McNamee	333
Wilson *v.* Maryat	605
Wilson *v.* Wall	426
Windsor, *In re*	282
Wolff *v.* Oxholm	304
Wolff v. *Oxholm*	496
Wong Quan v. *United States*	382
Worcester *v.* Georgia	427
Wren, The	844
Wright *v.* Nutt	487
Wunderle v. *Wunderle*	414
Young, Assignee of Collie	481
Yrisarri v. *Clement*	23
Zee Star, The	910
Zeiter's Case	377
Zelden Rust, The	765
Zepherina, The	152

SYLLABUS.

INTRODUCTION.

1. **Definitions of International Law, or the Law of Nations.** Cases, 1–4; 8.
Bluntschli, § 1; 1 Calvo, § 1; Creasy, 1; Hall, 1; 1 Halleck, 46; 1 Jones, 262, 2 *Ib.*, 246 ; 1 Kent, 1; Lawrence, 1–9; Liszt, 1–6; 1 Martens, 21–31; Pillet, Le droit international public, 1 R. D. I. P., 1; Pomeroy, 2–25; 1 Rivier, 3–7; Rivier, L. B., 1–2; Snow, § 1; Taylor, § 2; D. Wheaton, 23; L. Wheaton, 26; Walker, Manual, 1–10; Westlake, 1; Woolsey, 2–3.

2. **Origin of the Terms "Law of Nations," and "International Law."** Compare with the terms "Jus Gentium," "Jus Naturale," "Droit des gens," "Droit international," "Völkerrecht." Bonfils, §§ 1–4; Creasy, 3–21; D. Wheaton, 4–6, 16–21 and note 7; L. Wheaton, 14–21 and notes.

3. **International Law is a Branch of True Law. Objections by Austin and his followers to the term "law" as used in "international law," on the ground that there is no superior power to enforce it: it has no "sanction."** Austin's Jurisprudence, abridged ed., 5–18, 59–63, 74, 85; Holland's Jurisprudence, 9th ed., 125–126; 369–372; 2 Stephen, History of the Criminal Law, 32 *et seq.* The opposite view, namely, that International law is law, rather than international comity or morality, is held by the great majority of publicists: Bluntschli, 2–11; Bonfils, §§ 26–31; Creasy, 70–76; Hall, 14–17; Fiore, De la sanction juridique du droit international, 30 R. D. I., 5; Jellinek, Recht des modernen Staates, 302–307, 337–341; Kebedgy, Contribution à l'étude de la sanction du droit international, 29 R. D. I., 113 *et seq.*; Lawrence, Essays on International Law (2d ed.), 1–41; Liszt, 6–8; Maine, 26–53; 1 Rivier, 18–26; Walker, Science, 1–40, 45–56; Walker, History, 1–19; Woolsey, §§ 26–29. Perhaps the aptest description of the legal nature of International law, is that for which Sir Frederick Pollock stands sponsor: "Customs and observances in an imperfectly organized society which have not fully acquired the character of law, but

are on the way to become law" (werdendes Recht). First Book of Jurisprudence, 13.

4. **The Nature and Sources of International Law.** Cases, 19.
Bluntschli, 11–19; Bonfils, §§ 5–70; 1 Calvo, §§ 1–40; Creasy, 65–92; Hall, 1–14; 1 Halleck, ch. II.; Holtzendorff, Introduction au droit des gens, 1–76; Les sources du droit des gens, 79–147 (1 Handbuch, Fr. ed., 79–147); Jellinek, System der subjektiven öffentlichen Rechte, 296–314; Kaufmann, Die Rechtskraft des internationalen Rechtes, 1899; Lawrence, 10–25, 91–110; Liszt, 9–12; Maine, 1–25; Maine, Ancient Law, 70–108; 1 Martens, 1–20, 243–254; Nys, Origines du droit international; 1 Phillimore, ch. III.; Pomeroy, 25–44; 1 Rivier, 27–42; Rivier, L. B., 9–16; Snow, § 3; Taylor, §§ 6–23, 30–36, 65–95, 105–115; 1 Twiss, 145–177; Walker, History, 20–29; Westlake, ch. VI.; Wheaton, ch. I.

5. **Historical Sketch of International Law.** Bonfils, §§ 71–146; 1 Calvo, 1–137; 1 Halleck, ch. I.; Holtzendorff, Le développement historique des relations internationales jusqu'à la paix de Westphalie (1648), (1 Handbuch, Fr. ed., 152–348); Lawrence, 26–54; Liszt, 12–30; 1 Martens, 32–246; Rivier, L. B., 16–73; Rivier, Esquisse d'une histoire littéraire des systèmes et méthodes du droit des gens depuis Grotius jusqu'à nos jours (1 Holtzendorff's Handbuch, Fr. ed., 351–494); Taylor, §§ 37–48; Walker, History, Vol. I., to Peace of Westphalia; Westlake, 17–77. Ward's History of the Law of Nations (to time of Grotius), 1795, is still useful, and Wheaton's History of the Law of Nations (to 1842), 1845, has not been displaced. The French edition is later and therefore preferable.

6. **International Law is a Part of the Law of States.** Cases, 6–10, 13–22.
Kent, 1, note *a*; Liszt, 6; Triepel, Völkerrecht und Landesrecht, 1899; Walker, Science, 41–56; Woolsey, § 29.

7. **The Leading Writers on International Law.** Bonfils, §§ 147–153; 1 Calvo, 27–32, 45–46, 51–55, 61–63, 70–73, 101–120; 1 Halleck, ch. I.; Liszt, 31–33; Rivier, Esquisse (see § 5), is still the most satisfactory enumeration and criticism of the writers, their systems, relative rank and worth; Woolsey, Appendix 1 (A brief selection of works and documents bearing on International Law).

8. **Private International Law; or, The Conflict of Laws.** 1 Calvo, 120–125; Hall, 54; 2 Martens, 391–505; Phillimore, Vol. IV.;

Woolsey, §§ 73, 74. The following are special treatises on this subject: Beale, Cases on Conflict of Laws, 3 vols., 1901–1902 (Vol. 3, pp. 501–545, contains an excellent "Summary of Conflict of Laws"); Minor, Conflict of Laws, 1901; Story, Conflict of Laws, 8th ed., 1883; Westlake, Private International Law, 3d ed., 1890 (4th edition announced); Wharton, Conflict of Laws, 2d ed., 1881. Leading works in foreign languages are the following: Asser & Rivier, Éléments de droit international privé, 1884; v. Bar, Theorie und Praxis des internationalen Privatrechts, 2d ed., 1889 (English translation entitled, Private International Law, by G. R. Gillespie, 1892); v. Bar, Lehrbuch des internationalen Privat- und Strafrechts, 1892; Despagnet, Précis de droit international privé, 3d ed., 1889; Fiore, Droit international privé (French translation of the Italian original, by Pradier-Fodéré, 1875); Lainé's masterly Introduction au droit international privé, 2 vols., 1888, 1892; Savigny, System des heutigen römischen Rechts, Vol. 8, 1849 (translated by W. Guthrie, as Treatise on the Conflict of Laws, and the Limits of their Operation in respect of Place and Time, 2d ed., 1880); Vareilles-Sommières, La synthèse du droit international privé, 2 vols., 1897; Weiss, Manuel de droit international privé, 2d ed., 1898; Zitelman, Internationales Privatrecht, 2 vols., 1897, *et seq.*

PART I.

INTERNATIONAL LAW IN TIME OF PEACE.

I. Sovereign States — De Facto States.

(*a*) *Sovereign States.*

9. **Sovereign States are the Subjects or Persons of International Law.** The Republic of Honduras v. Soto, Cases, 24.
Bluntschli, §§ 17–27; Bonfils, §§ 154–159; Hall, § 1; Heffter, § 15; Jellinek, Recht des modernen Staates, 348–349; 1 Jones, 518, 2 *Ib.*, 463; Lawrence, 55; Liszt, 34–40; 1 Martens, 307–311; 1 Phillimore, 79; 1 Rivier, 45–54; Snow, § 4; 1 Twiss, 1–15; D. Wheaton, § 16.

10. **Definition and Nature of Sovereign States.** Yrisarri v. Clement, Cases, 23; Texas v. White, *Ib.*, 25; Keith v. Clark, *Ib.*, 28; *Ib.*, notes, 36–37.

Bluntschli, §§ 18–21, 62–70 ; Bonfils, §§ 160–164; 1 Calvo, § 39; Creasy, 6, 93; Heffter, §§ 15–16 ; Jellinek, System der subjektiven öffentlichen Rechte, 12–39; Jellinek, Recht des modernen Staates, 115–161 ; Lawrence, 56–90 ; Liszt, 35–38 ; Maine, 54–68; 1 Phillimore, 81–85; Pomeroy, 45–59; Rivier, L. B., 88–92; Stubbs, Suzerainty: Mediæval and Modern, 25 Law Magazine and Review, 5th ser., 413–452; D. Wheaton, 29–31; L. Wheaton, 31–33, 58; Woolsey, 34–36.

11. **Distinction between Internal and External Sovereignty of States.** Bluntschli, § 64 ; Holland, Jurisprudence, 47–49, 350–351, 373 ; Liszt, 52–71; Snow, § 5; D. Wheaton, 31; L. Wheaton, 35.

12. **Internal Changes in a State do not affect its standing in International Law.** Keith v. Clark, Cases, 28.
Creasy, 99–109; Hall, 22–24; Liszt, 40; 1 Phillimore, 202–212; Pomeroy, 69–78 ; 1 Rivier, 62–63; Rivier, L. B., 94–95 ; D. Wheaton, 33–34 ; L. Wheaton, 39 ; Woolsey, §§ 38–39.

13. **The Fundamental Rights and Duties of States.** Bluntschli, §§ 62–107, 378, 379; Bonfils, §§ 235–332 ; Hall, §§ 7–14 ; 1 Halleck, ch. IV. ; Lawrence, 108–111 ; Liszt, 52–71, 98–101; Pillet, Recherches sur les droits fondamentaux des états dans l'ordre des rapports internationals, 1899; Pomeroy, 79–144; 1 Rivier, 255–266; Rivier, L. B., 174–180 ; Snow, § 8; Taylor, §§ 117–119 ; D. Wheaton, §§ 60–62 ; L. Wheaton, 115.

14. **Classification of States: "Centralized States," "Personal Union," "Real Union," (Bundestaat), "Confederate Union" (Staatenbund), Protected State, Neutralized State.** Cases, 45–53.
Bluntschli, §§ 70–76; Bonfils, §§ 165–194, 345–369 ; 1 Calvo, §§ 44–77; Creasy, 135–142; Hall, § 4; 1 Halleck, 67–74, 116–118; Jellinek, Die Lehre von den Staatenverbindungen, 1882; Jellinek, Recht des modernen Staates, 674–719; 1 Jones, 76 ; Lawrence, 56–84; Liszt, 41–52; 1 Phillimore, 94–101 ; Pomeroy, 60–69 ; 1 Rivier, 75–123; Rivier, L. B., 103–124 ; Snow, § 6 ; Taylor, §§ 120 *et seq.*; 1 Twiss, 16–144; Westlake, 211–231 ; D. Wheaton, 40–41, 73, 78, 82, and note 32 ; L. Wheaton, 71–76.

15. **The Equality of States.** The *Antelope*, Cases, 27 note.
Bluntschli, § 81 ; Bonfils, §§ 272–278 ; 1 Halleck, ch. V.; Heffter, §§ 27–28 ; Lawrence, Essays, 208–233 ; Liszt, 52–54 ; Pomeroy, 247–263 ; 1 Rivier, 123–131; Rivier, L. B., 124–128; Westlake, 86–109 ; D. Wheaton, 52 ; L. Wheaton, 58 ; Woolsey, § 52.

16. **Date of the Commencement of States.** Bluntschli, § 29; Bonfils, §§ 195–213; Hall, § 26; Heffter, §§ 23–25; Jellinek, Recht des modernen Staates, 239–258; Lawrence, 84–88; Liszt, 38; 1 Martens, §§ 63–66; 1 Rivier, 54–57; D. Wheaton, 41; L. Wheaton, 46–47.

17. **Effect of the Recognition of a New State by the Parent State, and by Third States.** Cases, 37–44.
Bluntschli, § 30; Hall, 87–96; 1 Halleck, 79–88; Hart, 208–209; Liszt, 39–40; Penfield, Recognition of a New State, 32 Am. Law Review, 390–408; 1 Rivier, 57–61; Snow, § 8; Taylor, §§ 146–159; 1 Wharton's Digest, 522; D. Wheaton, 32.

18. **When is the Recognition by Third States of a New State claiming Independence, proper?** Cases, 44–45, note.
Bluntschli, §§ 31–35; Creasy, 677–681; Hall, 90–93; Liszt, 40; 2 Phillimore, 20–44; D. Wheaton, 41–46, and note 16; L. Wheaton, 46–47.

19. **Methods of Recognition. — The Congo State.** Cases, 37–44.
Hall, 94–95, and note; 1 Jones, 100, 2 *Ib.*, 85; Fauchille, L'Annexion du Congo à la Belgique, 2 R. G. D. I., 400–439; Moynier, La Fondation de l'État Indepéndant du Congo, 1887. Les Frontières de l'État du Congo, 1 R. G., 409–429.

20. **The Effect of a Change of Sovereignty upon Public Rights and Obligations.** U. S. v. Prioleau, Cases, 85; U. S. v. Smith, *Ib.*, 89; Case of The Texan Bonds, *Ib.*, 94, note; opinions of Hall and Kent, *Ib.*, 96, note; Terlinden *v.* Ames, *Ib.*, 436.
Appleton, Des effets de l'annexion sur les dettes de l'état demembré ou annexé, 1892; Creasy, 144–146; Huber, Die Staatensuccession, 1898; Larivière, Des conséquences des transformations territoriales des états sur les traités anterieurs, 1892; Lawrence, 647–651; Liszt, 172–176; 1 Phillimore, 211; 1 Rivier, 69–75; Rowe, Political and Legal Aspects of Change of Sovereignty, 41 Am. Law Register, N. S., 466–477; Snow, § 9; D. Wheaton, 42–49; L. Wheaton, 48–53; Woolsey, § 38.

21. **Effect of a Change of Sovereignty upon Private Rights.** U. S. v. Percheman, Cases, 95; U. S. v. Repentigny, *Ib.*, 98.
1 Jones, 5–18, 2 *Ib.*, 463; Liszt, 89.

22. **Effect of a Change of Sovereignty upon Laws.** Blankard v. Galdy, Cases, 104; Com. v. Chapman, *Ib.*, note 106; Chappell v. Jardine,

Ib., 108 ; Mortimer v. N. Y. Elevated R. R. Co., *Ib.*, 111 ; McKennon v. Winn, *Ib.*, 114.
Magoon, Military Occupation, 25–28, 226.

(*b*) *De Facto States.*

23. **Belligerent Communities.** Thorington v. Smith, Cases, 53 ; Home Insurance Co.'s Case, *Ib.*, 59 ; Legal relation of the *de facto* to the parent or *de jure* State as regards legislation, administration, and judicial acts of the former, *Ib.*, 61, note; The *Lilla*, *Ib.*, 62, note ; Underhill v. Hernandez, *Ib.*, 62.
Bluntschli, §§ 47–48; Hall, 31–37; 1 Halleck, 79–86; Liszt, 37, 288; Snow, § 10; Taylor, §§ 145–147 ; Woolsey, § 40.

24. **Recognition of Belligerency.** Annual Message of President Grant, Dec. 7, 1875; Cases, 758, note.
Bernard, Neutrality of Great Britain during the American Civil War, 1870, 106–117, and note; Hall, 35–42; Historicus on Recognition, 1–37; 1 Jones, 51, 2 *Ib.*, 38; De Olivart, La reconnaissance des insurgés comme belligérants, 28 R. D. I., 100–103; 1 Wharton's Digest, § 69; D. Wheaton, note 15; L. Wheaton, 40, note; Woolsey, § 41.

25. **Have Belligerent Communities any Legal Right to Recognition by Sovereign States? Forms of Recognition.** Bluntschli, § 512; Bonfils, §§ 1045–1047; Hall, 37–39; Liszt, 157; Pomeroy, 264–312; Taylor, §§ 148–152; D. Wheaton, 34, note 15, especially, pp. 37–38.

26. **Recognition of Confederate States, 1861.** Fifield v. Ins. Co., Cases, 44, note.
Bernard, Neutrality, 122–134 (135–150 for documents); Bluntschli in 2 R. D. I., 452–485; Hall, 39–42; Pomeroy, 289–295; Taylor, § 15; D. Wheaton, 37, note; Woolsey, § 180.

27. **Succession to the Rights of Belligerent Communities.** U. S. v. Prioleau, Cases, 87; U. S. v. Smith, *Ib.*, 89; U. S. v. McRae, *Ib.*, 89, 91; Titus v. U. S., *Ib.*, 94, note.

28. **The Relations of a Belligerent Community after acquiring Independence to the Contract Rights and Duties of the Parent State, on (1) Treaty Obligations, (2) Property, (3) Debts.** Bluntschli, §§ 47–48; Bonfils, §§ 214–234; Hall, §§ 27–28; Heffter, § 25; Liszt, 172–176; Magoon, 177, 194, 529.

29. **Alleged Right of the United States in the British-American Fisheries.**
Geffcken, La question des pécheries, 22 R. D. I., 217–233; Hall, 99–100; Hart, 206–208, 220–221; Isham, The Fishery Question, 1887; 1 Jones, 206, 2 *Ib.*, 183–184; Liszt, 74, 255–258; Pomeroy, 181, 368–371; Schuyler, The Fisheries (Am. Dip., 404–420); Taylor, §§ 249–250; 3 Wharton's Digest, § 302.

II. The Territorial Property of a State.

(*a*) *Extent and Nature of Territorial Property.*

30. **In what does the Territorial Property of a State consist?** Bonfils, §§ 482–519; Hall, § 30; Jellinek, Recht des modernen Staates, 355–366; 1 Jones, 545; Liszt, 71–83; Snow, § 11; D. Wheaton, § 162.

31. **The Nature of the Proprietary Title of a State in (1) the Land owned by Individuals, (2) Public Lands, (3) Navy Yards, Arsenals, etc., (4) Lakes, Rivers, Straits, (5) Marginal Seas.** Bluntschli, §§ 276–277, 296–310; Hall, §§ 30–46; 1 Halleck, ch. VI.; Lawrence, 136–160; Liszt, 71–83; Maine, 69–93; Pomeroy, 145–190; 1 Rivier, 135–171; Rivier, L. B., 129–141; 1 Twiss, 228–235; Westlake, 129–133; Wharton's Digest, §§ 1, 2, 310, 311; D. Wheaton, §§ 163–164.

(*b*) *Acquisition of Territory.*

32. **Modes of acquiring Territory.** Jones v. U. S., Cases, pp. 39–40; U. S. v. Percheman, *Ib.*, 95; Am. Ins. Co. v. Canter, *Ib.*, 657.
Bluntschli, §§ 276–295; Bonfils, §§ 532–571; Hall, § 31; 1 Halleck, 154; Hart, 194–196; Liszt, 83–90; Pomeroy, 91–93; 1 Rivier, 172–188; Rivier, L. B., 145–146; Walker, Manual, 26–34; D. Wheaton, § 161.

33. **Title to Territory based on Discovery.** Johnson v. McIntosh, Cases, 71.
Westlake, 134–160.

34. **Title to Territory, based on Prior Discovery of the Coast and Mouths of Rivers, upon Occupation, Exploration, and Contiguity.** (1) The Oregon Territory (Foster's American Diplomacy, 302–313, corrected, as most American accounts must be, by Bourne's, "Legend of Marcus Whitman" in Essays in Historical Criticism, 1901, pp. 1–109); Hall, 115–117; Hart, 194–195; 1 Moore, Int. Arb. 196–213;

Pomeroy, 98, 102, 111–114; Taylor, §§ 99–102; D. Wheaton, 250–255. (2) Delagoa Bay (Hall, 122; 5 Moore, Int. Arb., 4984–4985). (3) Texas (Hall, 113–115).

35. **Inchoate Title acquired by Discovery. Occupation to give Title presupposes (1) intent to occupy, (2) Continuous Occupation, (3) a State Act or Subsequent Ratification of the Act by the State.** Bluntschli, §§ 278–279; Bonfils, §§ 536–563; Hall, 106–113; Jèze, Étude sur l'occupation, 1896; Liszt, 90–92; 2 Moore, Int. Arb., 1909–1922; 1 Phillimore, 329; Pomeroy, 94–111; 1 Rivier, 188–197; Rivier, L. B., 146–150; 1 Twiss, 191–206; Westlake, 160–177.

36. **Abandonment of Territory once occupied.** Santa Lucia, Hall, 120–121; 1 Phillimore, 368.

37. **Tendency to change the Law of Occupation. — Berlin Conference, 1885.** Bonfils, §§ 557–561; Hall, § 33*, and notes; Liszt, 92.

38. **Prescription gives Valid Title to Territory by the Rules of International Law.** Rhode Island v. Massachusetts, 4 How. 591; Virginia v. Tennessee, 148 U. S. 503, 522–524, and authorities there cited. Bluntschli, § 290; Bonfils, § 534; Creasy, 249–255; Hall, § 36, and note; 1 Jones, 441; 2 *Ib.*, 402; 4 Moore, Int. Arb., 4179–4203; 1 Phillimore, 353–368; 1 Rivier, 182–183; Pomeroy, 119–131; D. Wheaton, 239, note 101; L. Wheaton, 303.

39. **Acquisition of Territory by Accretion.** The *Anna*, Cases, 74, note; C. Cushing, 8 Op. Atty.-Gen. 175.
Bluntschli, §§ 294–295; Bonfils, § 533; Creasy, 241–249; Hall, 125–127; 1 Phillimore, 342–345; Pomeroy, 114–180; Rivier, 179–180; Rivier, L. B., 145.

40. **Acquisition of Territory by Conquest or Cession: the Loss of Territory.** Harcourt v. Galliard, Cases, 70; U. S. v. Percheman, *Ib.*, 95; Am. Ins. Co. v. Canter, *Ib.*, 657.
Bluntschli, §§ 285–286; Liszt, 67, 151; 1 Phillimore, 369–387; 1 Rivier, 181–182, 197–217, 217–220; Rivier, L. B., 150–154, 154–155.

(*c*) *Acquisition of Rights in Foreign Territory.*

41. **Servitudes in International Law.** Bluntschli, §§ 353, 359; Bonfils, §§ 338–344 (note for literature); Creasy, 255–259; Hall, 166; Liszt, 67, 151; 1 Phillimore, 388–392; 1 Rivier, 258, 296–303.

42. **The Navigation of Rivers.** (1) The Mississippi, Cases, 132, note; (2) The St. Lawrence, *Ib.*, 132, note; (3) European Rivers, *Ib.*, 132, note; (4) South American Rivers, *Ib.*, 132, note; (5) African Rivers, *Ib.*, 132, note.
Bluntschli, §§ 311–315; Bonfils, 264–270; Hall, 136–146; 1 Halleck, 171–179; Hart, 201; Heffter, § 77; 1 Jones, 392, 2 *Ib.*, 359; Lawrence, 186–189; Liszt, 206–213; 2 Martens, 345–361; 1 Phillimore, 223–247; Pomeroy, 147–164; 1 Rivier, 221–229; Rivier, L. B., 155–162; Schuyler, The Free Navigation of Rivers and Seas (Am. Dip., 265–366); Taylor, §§ 233–241; D. Wheaton, 274–288; Woolsey, 79–83.

43. **Protectorates over Semi-civilized Peoples. "Spheres of Influence."** Bonfils, §§ 182–187, 558–562, 176 (note for literature generally on the subject of protectorates); Hall, §§ 38*, 38**; Hall, Foreign Powers and Jurisdiction of the British Crown, 1894, pp. 204–238; Hill, The Growth and Development of International Law in Africa, 16 Law Quarterly Review, 249–268; Liszt, 73–74; Westlake, 174–189.

(*d*) *Boundaries.*

44. **In the United States, the Political Department of the Government determines what are the Boundaries under Treaties.** Foster v. Neilson, Cases, 75; U. S. v. Texas, *Ib.*, 76, note 1; *in re* Cooper, *Ib.*, 76, note 1; James G. Swan, *Ib.*, 76, note 1.

45. **The Determination of River-Boundaries.** Handly v. Anthony, Cases, 116; Buttenuth v. St. Louis Bridge Co., *Ib.*, 121; Cooley v. Golden, *Ib.*, 129; The *Twee Gebroeders*, *Ib.*, 129, note; Opinion of C. Cushing, 1856, 8 Op. Atty.-Gen., 175.
Bluntschli, §§ 298–300; Bonfils, § 487; Liszt, 71; 1 Martens, 454–456; 1 Rivier, 165–171; D. Wheaton, 274.

46. **Determination of Boundaries in the Cases of Lakes and Mountains.** Bluntschli, §§ 297, 301–303; Bonfils, § 487; Hall, § 38; 1 Martens, 457–458.

(*e*) *Territorial Waters of a State.*

47. **The History of Attempts to appropriate the Seas, or Portions of them; the contest between mare clausum and mare liberum.** Bluntschli, §§ 304–309; Bonfils, §§ 572–576; 1 Calvo, §§ 348–352; 2 Cauchy, Le droit maritime international, 1862, 92–124; Creasy, 226–231; Hall, § 40; Liszt, 196–197; 1 Martens, 491–496; 1 Phillimore,

247–256; Pomeroy, 182–190; 1 Rivier, 234–239; Rivier, H. B., 166–168; Snow, § 12; Taylor, §§ 242–246; 1 Twiss, 284–291; Walker, Science, 163–171; D. Wheaton, note 113.

48. **The Origin of the Rule limiting the Territorial Right of a State in the Sea to a Marine League from the Shore: "Terrae dominium finitur ubi finitur armorum vis."** The Queen v. Keyn, Cases, 154. Bonfils, §§ 490–494; 1 Calvo, §§ 354–356; Creasy, 233–240; Hall, § 41; 1 Halleck, 157; 1 Phillimore, 274 *et seq.*; Pomeroy, 176–180; Walker, Science, 171–175; Wharton's Digest, § 32; Woolsey, 68–70.

49. **Bodies of Water more than Six Miles wide:**
(*a*) *Straits and Lakes, more than six miles wide.* — U. S. v. Rodgers, Cases, 132; The Sound Dues, D. Wheaton, 264–267; Snow's Am. Dip., 124–127; Schuyler, Am. Dip., 306–316; The Bosphorus and Dardanelles, D. Wheaton, 263–264, 273–274, note 111; Schuyler's Am. Dip., 317–318.
(*b*) *Bays and Gulfs.* — The *Alleganean*, Cases, 143; Dunham v. Lamphere, *Ib.*, 153, note; The Schooner *Washington*, *Ib.*, 153, note; Mahler v. Transportation Co., *Ib.*, 153, note; Manchester v. Massachusetts, *Ib.*, 153, note; Shively v. Bowlby, *Ib.*, 153, note. Bluntschli, § 309; Bonfils, §§ 495–505, 516; 1 Calvo, §§ 357–374; Hall, 161–164; 1 Halleck, 165–172; Liszt, 76–197; Perels, Manuel du droit maritime international, 1884, 42–46; Pomeroy, 164–176; 1 Rivier, 143–159; Rivier, H. B., 133–137; Taylor, §§ 229–231; Wharton's Digest, §§ 28–29; Woolsey, 76–79.

50. **Interoceanic Canals. — Suez Canal, 1869 (neutralized, 1888); Corinth, 1893; Kiel, 1896; Panama, ——.** Bonfils, §§ 506–515; 1 Calvo, §§ 376–380; De Bustamante, Le canal de Panama, et le droit international, 27 R. D. I., 112, 223; Hart, 219–220; Holland, Studies, 270–293; 1 Jones, 410, 530, 2 *Ib.*, 476; Lawrence, The Suez Canal in International Law (Studies, 41–88), The Panama Canal and the Clayton-Bulwer Treaty (*Ib.*, 89–162); Liszt, 75, 213–215 (authorities cited, 213, note); 1 Rivier, 231, 2 *Ib.*, 395; Rivier, H. B., 163–166; B. Wheaton, § 205 (*c. d. e.*).

III. Territorial Jurisdiction.

(*a*) *Doctrine of Exterritoriality. — Exception to the Rule of Exclusive Territorial Jurisdiction.*

51. **Sovereigns may sue in Courts of Foreign State.** Republic of Mexico v. Arrangoiz, Cases, 170; Prioleau v. U. S., *Ib.*, 173; U. S. v. Wagner, *Ib.*, 175; The *Sapphire*, *Ib.*, 178.

52. **Sovereigns are exempt in (1) their Persons, (2) in their Official Representatives, and (3) in their Property from the Jurisdiction of Foreign Courts of Law.** De Haber v. Queen of Portugal, Cases, 180; Strousberg v. Costa Rica, *Ib.*, 181, note; Mighell v. Sultan of Jahore, *Ib.*, 181, note; So. African Rep. v. Co. Fr.-Belge, *Ib.*, 181, note; Underhill v. Hernandez, *Ib.*, 62; Vavasseur v. Krupp, *Ib.*, 182; Beers v. Arkansas, *Ib.*, 186; for other cases, see *Ib.*, 189, note.

Bluntschli, §§ 129–134; Bonfils, 632–647; 3 Calvo, §§ 1451–1479; Hall, §§ 47–49; Heffter, §§ 48–57; 2 Jones, 12, 463; Liszt, 105–109; 2 Phillimore, 133–155; 1 Rivier, 411–425; Rivier, L. B., 249–256; Snow, § 20; Taylor, § 184.

53. **The Right of Legation: Rights, Privileges, and Duties of Diplomatic Representatives.** Bluntschli, §§ 159–240; Bonfils, §§ 652–702, 722–732; 3 Calvo, 165–215, 295–307, 323–336; Hübler, Die Magistrâturen des völkerrechtlichen Verkehrs, 1900; Lisboa, Exterritorialité et immunités des agents diplomatiques, 1 R. D. I. (2d ser.), 354–367; Liszt, 109–118; 2 Phillimore, 176–201, 246–264; Pomeroy, 396–454; 1 Rivier, 429–488; Rivier, H. B., 257–280; Schuyler, Diplomatic Officials (Am. Dip., pp. 105–190); Snow, § 21; Taylor, §§ 273–300, 303–304, 305–306, 313–324; 1 Twiss, 333–381; Woolsey, §§ 86–98.

54. **Immunities of Diplomatic Agents:**
(*a*) *From Criminal Jurisdiction.* — (1) Case of Bishop of Ross, 1571, Cases, 191, note; (2) Case of Mendoza, 1584, *Ib.*, 191, note; (3) Case of Da Sa, 1653, *Ib.*, 191, note; (4) Case of Gyllenborg, 1717, *Ib.*, 192, note; (5) Case of Prince Cellamare, 1718, *Ib.*, 192, note.

Bluntschli, §§ 136, 141, 142; Bonfils, §§ 703–711; 3 Calvo, §§ 1511–1520; Hall, 178–180; 1 Halleck, 332–339; 2 Phillimore, 199–218; 1 Rivier, 488–493; Rivier, L. B., 280.

55. **Immunities of Diplomatic Agents:**
(*b*) *Exemption from Civil Jurisdiction.* — (1) Case of Peter the Great's Ambassador, 1708, Cases, 4, 6, 192, note; (2) Case of Baron de Wrech, 1772, *Ib.*, 192, note; (3) Case of Wheaton, 1839, *Ib.*, 192, note; (4) Case of Dillon, 1854, *Ib.*, 192, note; (5) Case of Dubois, 1856, *Ib.*, 192, note; Heathfield v. Chilton, *Ib.*, 189; Parkinson v. Potter, *Ib.*, 192; *in re* Baiz, *Ib.*, 197; Wilson v. Blanco, *Ib.*, 206; New Chile Mining Co. v. Blanco, *Ib.*, 207, note; Dupont v. Pichon, *Ib.*, 208, note.

Bluntschli, §§ 135–153; Bonfils, §§ 712–721; 3 Calvo, §§ 1506–1510; Hall, 180–188; 2 Phillimore, 219–240; 1 Rivier, 439–518; Rivier, H. B., 283–292; D. Wheaton, 299–320 (especially Dana's notes, nos. 125–131); L. Wheaton, 392–416.

56. **Armed Forces and Ships of War in Foreign Territory are exempt from Local Jurisdiction.** The Schooner Exchange v. M'Faddon, Cases, 208; The *Constitution*, *Ib.*, 218; Coleman v. Tennessee, *Ib.*, 212, note; Neal Dow v. Johnson, *Ib.*, 212, note.
Bluntschli, § 321; Bonfils, §§ 614–623; 3 Calvo, §§ 1550–1560; Ferber, Internationale Rechtsverhältnisse der Kriegs- und Handelsschiffe, im Krieg und Frieden, 1895; Hall, §§ 54–57; 1 Halleck, 215–230; Lawrence, 222–226; Liszt, 78, 82, 194–196; Morse, Status of Public Vessel in Foreign Waters, 22 Wash. L. Rep. 707; 1 Phillimore, 476–483; Pomeroy, 209–220; 1 Rivier, 156, 330–335; Snow, § 23; Taylor, §§ 253–261; Twiss, Exterritoriality of Public Ships of War (Law Magazine and Review, 1876); Wharton's Digest, § 36; D. Wheaton, § 100, notes, nos. 61 and 63.

57. **Public Ships other than Men-of-war are likewise exempt from Process in Foreign Ports.** The *Parlement Belge*, Cases, 220, and note; Vavasseur v. Krupp, *Ib.*, 182, and note 1, 186.
Bonfils, § 629; Hall, §§ 44, 57*; Liszt, 82.

58. **Merchant Vessels do not, as a Rule, enjoy Exemption from Local Jurisdiction in Foreign Ports: The exemption, if it exist, is the result of a special custom based upon a tacit or express renunciation of territorial sovereignty.** Wildenhus Case, Cases, 227; The *Newton* and The *Sally* (1 Ortolan, Diplomatie de la Mer, 450), *Ib.*, 227; Case of Jally (1 Ortolan, *Ib.*, 455), *Ib.*, 229; The *Anemone*, *Ib.*, 228, note; Ellis v. Mitchell, *Ib.*, 234; *in re* Ross, *Ib.*, 238; The *Creole*, *Ib.*, 252, 255, note; Other Cases, *Ib.*, 233, note.
Bluntschli, §§ 317–320, 322; Bonfils, §§ 595–606, 624–629; 1 Calvo, § 474; Hall, §§ 58–60; 1 Halleck, 230–232; Liszt, 75, 78–81; A. P. Morse, Compétence de la jurisdiction locale à l'égard des navires de commerce étrangers, 18 J. I. P., 751, 1088; 1 Phillimore, 483–487; Pomeroy, 220–224; Snow, § 26; Taylor, §§ 263–271.

59. **The Fiction of Exterritoriality, — its Origin and Purpose explained and criticised.** Hall, § 57; Historicus, 201–212; Liszt, 70–71, 114–115; Pietri, Étude critique sur la fiction d'exterritorialité, 1895; Piggott, Exterritoriality, 1892.

(*b*) *Right of Asylum.*

60. **Legations should not and do not, as a Rule, grant Asylum either to Political Refugees or to Fugitives from Justice. Exception in the Case of Spanish-American States.** Duke of Ripperda, 1726, Cases, 257, note; Springer's Case, 1747, *Ib.*, 258, note; United States v. Jeffers, *Ib.*, 256.
Bluntschli, §§ 151, 200, 201; Bonfils, §§ 696–698; Gilbert in 15 Harvard Law Rev., 118–140; Hall, 186, § 52; Liszt, 116; J. B. Moore, Asylum in Legations and Consulates and in Vessels, 7 Pol. Sc. Quart., 1, 197, 397; A. P. Morse, So-called Right of Asylum in Legations, 45 Alb. L. J., 311; 1 Rivier, 499–502; Snow, § 27; Taylor, §§ 311–312.

61. **Sound Principle, if not Practice, would seem to deny to Ships of War the Right to grant Asylum to Political Refugees. It is, however, Common Practice in Spanish-American Waters.** (2) Forbes v. Cochrane, Cases, 258; (1) Lord Stowell's Opinion in the Case of John Brown, 1820, *Ib.*, 264, note; Admiral de Gama's Case, 1894, 1 R. D. J. P., 273 *et seq.*; Martens-Ferrao in 26 R. D. I., 378; Fugitive Slaves and Other Cases, Cases, 255, note.
Bonfils, § 622; Hall, 203–204; 1 Halleck, 228–230; Lawrence, 226–229; Maine, 86–88; Taylor, §§ 259, 260.

62. **Merchant Ships, not being exempt by International Law from the Jurisdiction of the Foreign Port, cannot properly grant Asylum to Political or other Refugees.** United States v. Diekelman, Cases, 264; Sotelo's Case, *Ib.*, 273, note; Lord Aberdeen's Opinion, *Ib.*, 273, note; Gomez' Case, *Ib.*, 274, note; Barrundia's Case, *Ib.*, 275, note; Bonfils, 328–330; Coudert, Le droit de refuge à bord d'un navire étranger, 23 Journal de Droit, Int. Privé, 780; Lawrence, 227–228; J. B. Moore, in Political Science Quarterly, 1892; Taylor, § 271.

(*c*) *Other Questions of Territorial Jurisdiction.*

63. **Jurisdiction over Passing Vessels.** The Queen v. Keyn, Cases, 154.
1 Jones, 284; Foster in 11 Am. Law R., 625; Hall, § 59. and notes; Liszt, 76–81; 1 Rivier, 150; Schücking, Das Küstenmeer im internationalen Rechte, 1897.

64. **Are Aliens exempt from Military Duty?** Bluntschli, § 391; Bonfils, § 445; Hall, § 61, and note 2; Liszt, 69; 1 Rivier, 304–306; 6 Richardson's Messages and Papers, 168, 180; Roche, 15 J. I. P., 731; Taylor, § 467; Wharton's Digest, § 202.

65. **Are Offences committed by Citizens or Foreigners, beyond the Limits of a State, subject to the Jurisdiction of its Courts?** U. S. v. Davis, Cases, 294; State v. Wyckoff, *Ib.*, 296; State v. Carter, *Ib.*, 298, note; State v. Knight, *Ib.*, 300, note; Commonwealth v. Macloon, *Ib.*, 300, note; Commonwealth v. Blanding, *Ib.*, 300, note; Cutting's Case, *Ib.*, 301; United States v. Smiley, *Ib.*, 302; Other Cases and Opinions, *Ib.*, 304, note.
Bonfils, §§ 436–438; Diena, Des conflits de législation à l'égard des délits commis à l'étranger, 20 J. I. P., 24; Fiore, Délits commis à l'étranger, 11 R. D. I., 302; Fusinato, Des délits commis à l'étranger, 19 J. I. P., 56; Gamboa, L'Affaire Cutting (Mexican view), 22 R. D. I., 234–250; Hall, 221–223; Heffter, § 36; 2 Jones, 262; 1 Martens, §§ 85–86; Moore, Report on the Cutting Case, 1887; 1 Rivier, 271, 867; Rolin, L'Affaire Cutting, 20 R. D. I., 557–577; Taylor, §§ 194–197; Wharton, Conflict of Laws, 2d ed., §§ 809–813; Philosophy of Criminal Law, 309 *et seq.*

66. **Criminal Jurisdiction of State Courts in the United States.** U. S. v. Bevans, 1818, 3 Wheat. 336 (at p. 386).

67. **Extradition of Fugitives from Justice: (1) is, in International Law, a Conventional not a Moral Duty; it does not exist in the Absence of Treaty Stipulations; (2) it is, in the United States, strictly and exclusively a Federal Question; (3) the Person extradited is triable for the Offence for which he was extradited, but for no other,** U. S. v. Rauscher, Cases, 274; Case of Arguelles (1 Moore on Extradition, 33), Cases, 282, note; *Ex parte* Holmes (1 Moore, 55–58), *Ib.*, 282, note; Winslow's Case (1 Moore, 196, 212), *Ib.*, 282, note.

68. **As a Person is extradited for the Commission of a Conventional Crime, the Nationality of the Criminal is clearly immaterial; however, to prevent misunderstandings, it is customary to exclude citizens of the contracting States from the operation of the provision of the treaty.** Case of Trimble (1 Moore, 166, 152–193), Cases, 293, note.

69. **States do not, as a Rule, surrender Persons charged with Political or Military Offences.** *In re* Castioni, Cases, 285; *in re* Ezeta,

Ib., 293, note ; Burley's Case (1 Moore, 319), *Ib.*, 293, note ; St. Alban's Raid (1 Moore, 322), *Ib.*, 293, note ; Cazo's Case (1 Moore, 324), *Ib.*, 293, note.
De Hart, The Extradition of Political Offenders, 1 Law Quarterly Review, 177–187.

70. **Extradition, termed "Inter-state Rendition," obtains between the Members of the American Union; it is, however, a "moral" as distinguished from a "legal" duty. It differs from the extradition of the Law of Nations in that the person rendered or delivered up may properly be tried for and convicted of a crime other than that for which he was surrendered.** State v. Patterson, Cases, 283, and note p. 285 for other cases.

71. **Leading Authorities and References on Extradition**: v. Bar, Lehrbuch des internationalen Privat- und Straf-rechts, 1892; Bernard, Traite théorique et pratique de l'extradition, 2d ed., 1890; Bellot, Traité de l'extradition, 1874 ; Bluntschli, §§ 394–401 ; Bonfils, §§ 455–481 ; 2 Calvo, §§ 949–1071 ; Clarke, Treatise on the Law of Extradition, 3d ed., 1888; Hall, 60–61 ; 1 Halleck, 235–239, 257–268 ; Heffter, § 63 ; 1 Jones, 199–202, 2 *Ib.*, 176–177 ; Lammasch, Auslieferungspflicht und Asylrecht, 1887 ; Lammasch, Rechtshilfe und Auslieferungsverträge (3 Holzendorff, H. B., 345–579); Lawrence, 233–240; Liszt, 242–246; 3 Martens, 2–116 ; Martitz, Internationale Rechts hilfe in Strafsachen, 1887, 1897 ; Moore, Treatise on Extradition and Interstate Rendition, 1891 ; 1 Phillimore, 515–552 ; Pomeroy, 235–242 ; 1 Rivier, 348–357 ; A. Rolin, Du principe de la non-extradition en matière de délits politiques, 24 R. D. I., 17–38 ; La répression des attentats anarchistes, 26 *Ib.*, 125–152 ; and articles in 15 *Ib.*, 147–166, 254–282, 19 *Ib.*, 545–580; Spear, The Law of Extradition, 2d ed., 1884 ; De Stieglitz, Étude sur l'extradition des criminels, 1883 ; Taylor, §§ 205–212 ; 1 Twiss, 405–417 ; D. Wheaton, 180-191, and notes; Woolsey, 111–117.

72. **Extraterritorial Acts of Persons by Order of their Government.** Buron v. Denman, Cases, 305, and note 307 ; The *Rolla*, *Ib.*, 309, note ; Case of McLeod, *Ib.*, 319, note.
Hall, § 65 ; Liszt, 177–180; Snow, § 21; Taylor, § 131 ; L. Wheaton, 189, note.

73. **Extraterritorial Acts of a State in Self-defence.** Commonwealth v. Blodgett, Cases, 308 ; The *Caroline*, *Ib.*, 67, 319, note ; (1 Jones,

263); Seizure of St. Marks, *Ib.*, 320, note; The *Virginius, Ib.*, 320, note.

Case of The *Virginius*, 3 L. Mag. and Rev. N. S., *Ib.*, 78, 609; 1 Jones, 262; Int. Law of The *Virginius, Ib.*, 56; L. T., 69, 263; 8 Am. Law. Rev., 470; Bonfils, § 242; Hall, §§ 83–87; Liszt, 182–184; Taylor, §§ 401–409; Wharton's Digest, § 50; Woolsey, 366–370.

74. **Responsibility for Injury to Foreigners by Civil Commotions and Mob-violence.** New Orleans v. Abbagnato, Cases, 320; New Orleans Riot, 1851 (2 Wharton's Digest, 600), New Orleans Mob, 1891, Cases, 329, note; L'Affaire d'Aigues-Mortes (1 R. D. I. P., 171–178).

Bar in R. D. I., 2d s., Vol. 1, 464–481; Bluntschli, §§ 379–380, *bis;* Bonfils, §§ 324–332; Bryce in New Review, 1891; 3 Calvo, 142–156; Despagnet, Les difficultés internationales venant de la constitution de certains états, 2 R. D. I. P., 184–199; Hall, 226–231; Huffcut, International Liability for Mob Injuries, 2 Am. Acad. Pol. & Soc. Sci., 69; 2 Jones, 342, 1 Jones, National Responsibility for Injuries to Foreigners, 49 L. T., 84; Liszt, 180–182; Mitchell, International Liability for Mob Injuries, 34 Am. Law Rev., 709–721; Snow, § 22; Taylor, §§ 129–130, 215–216.

75. **Is the Jurisdiction of a State over its Citizens and Property on the High Seas exclusive?** Bluntschli, §§ 317–319; Bonfils, §§ 607–613; Hall, § 77; 2 Jones, 211; Lawrence, 205–208; Liszt, 82; 1 Martens, 496–497; Snow, § 23; Taylor, § 262; D. Wheaton, §§ 108–109.

76. **Theory of the Territoriality of Merchant Vessels.** Hall, 258–267; Heffter, § 78; Historicus, 199–212; Liszt, 82; 2 Martens, 336; Pomeroy, 220–222; 1 Rivier, 140, 240; Taylor, § 263; Walker, Manual, 53–55; Woolsey, § 58.

77. **Impressment of Seamen.** Foster, Century Am. Dip., 235–238; Hart, 203–204; Schurz, Clay, Vol. I., pp. 70–96; Walker, Manual, 54–55; 3 Wharton's Digest, § 331; D. Wheaton, §§ 108–109, and note 67.

78. **Jurisdiction over Merchant Vessels on the High Seas.** Wilson v. McNamee, Cases, 329; Crapo v. Kelly, *Ib.*, 331, note; Regina v. Anderson, *Ib.*, 331, and note, 336; Regina v. Lesley, *Ib.*, 337; The *Belgenland, Ib.*, 338. See also Cassidy v. U. S., 1883 (Second Court

of Commissioners of Alabama Claims, no. 144), 5 Moore, Int. Arb., 4672; The *Costa Rica Packet*, 1897, 5 Moore, Int. Arb., 4948–4953. Snow, § 24.

79. **Municipal Seisures beyond the Three-mile Limit.** Church v. Hubbart, Cases, 343, note; The *Itata*, *Ib.*, 344, note; Other Cases, *Ib.*, 344, note 1; Act of Congress, March 2, 1797, § 27; Phelp's Argument before Behring Sea Tribunal (Am. Case, 150).
Liszt, 200; 1 Rivier, 151; Snow, § 26; Wharton's Digest, 105, 106, 109–112; B. Wheaton, § 179 *a*; D. Wheaton, 258, note, 108.

80. **Piracy. — Definition and Character of Piracy jure gentium.** Opinion of Sir L. Jenkins, Cases, 345; United States v. Smith, *Ib.*, 13; The *Magellan Pirates*, *Ib.*, 351; The Cases of The *Anna*, 1895, The *Prosper-Corlin*, 1896 (4 R. D. I. P., 425–427).
Bluntschli, §§ 343–352; Bonfils, §§ 594–595; 1 Calvo, §§ 485–495; Hall, § 81; 1 Jones, 429, 2 *Ib.*, 392; Liszt, 201–203; 1 Phillimore, 489 *et seq.*; Pomeroy, 224–229; 1 Rivier, 248–251; Rivier. L. B., 173; Schuyler, The Piratical Barbary Powers (Am. Dip., 193–232); Snow, § 27; Taylor, § 188; Walker, Manual, 55–60; L. Wheaton, 246, note, no. 79; Woolsey, § 144.

81. **May Rebels and Insurgents be regarded as Pirates? Piracy by Municipal Law.** United States v. The *Ambrose Light*, Cases, 346; United States v. Baker, *Ib.*, 350, note 1; Golden Rocket Cases, *Ib.*, 350, note 1; Fifield v. Insurance Co., *Ib.*, 350, note 1; Other Cases, *Ib.*, 351, note.
1 Calvo, §§ 496–512; Hall, § 82; 1 Halleck, 79–84; Holland, Studies in Int. Law, 159–160; Insurgents not Pirates, 32 Alb. L. J., 65; Lawrence, 209–219; Penfield, International Piracy in Time of War, North Am. Review (July), 1898; Taylor, § 189; 3 Wharton's Digest, 469; Wharton in 33 Alb. L. J., 125; D. Wheaton, 196, note; Woolsey, § 145; Wright, Recognition of Insurgents as Belligerents and Status of Insurgent Cruisers, 1 Pa. Law Ser., 491.

82. **The Slave Trade is not Piracy jure gentium.** *Le Louis*, Cases, 352; Other Cases, *Ib.*, 369, note 1.
Bluntschli, §§ 351–352; Bonfils, §§ 398–409; Creasy, 259–277; 5 Calvo, §§ 2996–3003; 1 Jones, 512; 2 *Ib.*, 456; Lawrence, 214–219; Liszt, 266–271; De Montardy, La traîte et le droit international, 1899; 1 Phillimore, 402–442; Pomeroy, 229–230; 1 Rivier, 374–379; Taylor, § 190; Walker, Manual, 60–65; D. Wheaton, §§ 125–133 and notes, 85–89; Woolsey, § 146.

V. Intervention.

83. **Character and Conditions of Intervention.** Bluntschli, §§ 68–69, 431–441; 474–480; Bonfils, §§ 295–323; Bourgeois, Le Principe de non-intervention, 4 R. D. I. P., 745; Creasy, 278–296; de Floeckher, De l'intervention en droit international, 1896 ; Gover, Public Intervention, 20 L. Mag. & Rev., 4th s., 259; Hall, 297–299; Heffter, §§ 44–46; Lawrence, 115–117; 1 Martens, § 76; 1 Phillimore, 553–638; Historicus, 14, 41; 1 Jones, 266; Liszt, 56–59, 277–279; 3 Moore, Int. Arb., 2313–2447; Payn, Intervention among States, 26 Law Magazine and Review, 5th ser. 176–201; Pomeroy, 242–245; 1 Rivier, 389–404; Rivier, L. B., 243–247; Snow, § 28; Taylor, §§ 81–90; 1 Wharton's Digest, § 45; D. Wheaton, § 63.

84. **Intervention on the Ground of Self-preservation for the Protection of (1) Institutions, (2) Good Order, (3) the External Safety of the Intervening State.** Creasy, 297–308; Hall, 299–301; Lawrence, 117–135, 652–666; Pomeroy, 245–246; Taylor, §§ 410–430.

85. **Intervention against Illegal or Immoral Acts. Case of Greece, 1826; Bulgaria, 1876; Cuba, 1898 ; China, 1900.** Hall, 302–306; Hart, Century of Cuban Diplomacy (Foundations of American Foreign Policy, 108–133); Liszt, 58, 283; Taylor, §§ 416–419 (See the Spanish side of the question by De Olivart, 4 R. D. I. P., 577; 5 *Ib.*, 358, 449; 7 *Ib.*, 541; 9 *Ib.*, 161); China and International Questions, 192 Edinburgh Rev., 450; Jellinek, China and International Law, 35 Am. Law Rev., 56–62; Lapradelle, La question chinoise, 8 R. D. I. P., 272–340 ; 9 *Ib.*, 49–115 *et seq.*

86. **Intervention under a Treaty of Guarantee on Invitation of one of the Parties to a Civil War,— under Collective Authority of the Body of States.** The Case of the Allies in 1821 in Spain and Italy; Belgium, 1830; U. S. in Peru, 1881; the constant intervention of the Powers in the affairs of Turkey, and the not infrequent intermeddling with Greece.
Foster, Century American Diplomacy, 358–382; Hall, 305–309; Holland, Studies in International Law, 201–269; Holland, European Concert in the Eastern Question, 1885; Rolin-Jacquemyns, Le droit international et la question d'Orient, 8 R. D. I., 293, 811; Les événements d'Orient, 10 *Ib.*, 5; Du droit d'intervention, 8 *Ib.*, 673 ; 9 *Ib.*, 103; La question d'Orient en 1885. 18 *Ib.*, 373, 504, 591; 19 *Ib.*, 37; Streit, La question cretoise, 4 R. D. I. P.,

61, 446; Hart, 163–165, 209–210; Hart, Foundations of American Foreign Policy, 1901, pp. 211–240; Intervention and the Monroe Doctrine, 1 Jones, 379, 2 *Ib.*, 344–345; Gilman's Life of Monroe, pp. 159–179, 277–294 (bibliography of the doctrine, classification, and enumeration of its various applications); Holls, Peace Conference at The Hague, pp. 270–271; Pellaway, The Monroe Doctrine, 1898.

87. **Nationality: The Doctrines of Indelible Allegiance and Expatriation.** Case of Æneas Macdonald; Cases, 370; Williams' Case, *Ib.*, 372, and note 374; Act of Congress, July 27, 1868, *Ib.*, 375; Act concerning Aliens and British Subjects, *Ib.*, 377, note; French Practice, *Ib.*, 347, note.

2 Calvo, §§ 539 *et seq.*; Cockburn, Nationality; Creasy, 357; Hall, 233–239; 1 Halleck, 401–403, 424–427; Hart, 216–218, 244–245; Heffter, § 59 *a*; 1 Jones, 391, 2 *Ib.*, 358–359; Jellinek, Recht des modernen Staates, 366–386; Lawrence, 190–193; Liszt, 62, 86; 3 Moore, Intr. Arb., 2449–2655; 1 Rivier, 268–271, 303–306; Rivier, L. B., 194–196; Snow, § 29; Taylor, §§ 172–180; Walker, Science, 204–218; Wharton's Digest, § 171; L. Wheaton, 891 *et seq.*

88. **Citizenship. — Naturalization.** Blair v. Silver Peak Mines, Cases, 376; Littell v. Erie R. Co., *Ib.*, 378; City of Minneapolis v. Reum, *Ib.*, 390; *in re* Moses, *Ib.*, 396; Hausding's Case, *Ib.*, 399, note; Embden's Case, *Ib.*, 399, note; Slaughter House Case, *Ib.*, 400, note; De Bode v. Regina, *Ib.*, 400, note. On the question of citizen and alien, and the protection accorded to them in general, Cassidy v. U. S., 1883 (Second Court of Commissioners of Alabama Claims, no. 144), 5 Moore, Int. Arb., 4672; The Pacific Mills v. U. S., 1883 (Second Court of Alabama Claims, no. 793), 5 Moore, Int. Arb., 4673.

Bluntschli, §§ 364–374; Bonfils, §§ 417–432; Hall, 239–256; 1 Halleck, ch. 12; Hart, 146–149, 225–226; 1 Jones, 85, 2 *Ib.*, 71 (Citizenship), 1 *Ib.*, 391–392, 2 *Ib.*, 359 (Naturalization); Lawrence, 193–202; Liszt, 95–101; 2 Martens, 247–287; De la qualité de citoyen d'un état au point de vue des rélations internationales, 2 R. D. I., 107; 1 Phillimore, 443–459; 1 Rivier, 204–213, 307–309; Salmond, Citizenship and Allegiance, 17 Law Quart. Rev., 270–282, 18 *Ib.*, 49–63; Snow, § 30; Stoerk, Les changements de nationalité et le droit des gens, 2 R. D. I. P., 273; Westlake, De la naturalization et de l'expatriation, on de changement de nationalité, 1 R. D. I., 102; Woodworth, Who are citizens of the United States, 32 Am. Law Review, 554–555.

89. **The Condition of a Naturalized Citizen who subsequently returns to his Native Land.** A Prussian Subject's Case, Cases, 399, note; Wagner's Case, *Ib.*, 400. note; Zeiter's Case, *Ib.*, 401, note.
Liszt, 97; Pomeroy, 251–258; Snow, § 31; 2 Wharton's Digest, §§ 181–182.

90. **Nationality of Children born abroad; of Illegitimate Children; of Married Women.** Hall, §§ 67–70; 1 Jones, 82 (and *ante*, § 87); Wharton's Digest, §§ 185, 186.

91. **The Effect of Domicile, and Declaration of Intention to become a Citizen, upon the Nationality of a Foreigner. His Relations to the Adopting State, when abroad, and the Protection it may accord him.** City of Minneapolis v. Reum, Cases, 390; *in re* Moses, *Ib.*, 396; Koszta's Case, *Ib.*, 400, note; Tousig's Case, *Ib.*, 401.
2 Calvo, 45; Hall, § 72; 1 Halleck, 109–111; Pomeroy, 252–260; Taylor, §§ 202–203; Walker, Manual, 66–68; Wharton's Digest, §§ 175, 198; D. Wheaton, note, no. 49 (especially at p. 146); Woolsey, Appendix III.

92. **Persons Destitute of Nationality: "Heimatlosen."** Bluntschli, § 369; Hall, § 74; Liszt, 96; 1 Rivier, 304–306.

93. **Status of Chinese in the United States.** Treaty of 1880, and Acts of Congress of May 6, 1882, July 5, 1884; Geary Act of 1892, Act of 1902. Under the Fourteenth Amendment to the Constitution. Chinese children, born in the United States, are citizens thereof, *Ex parte* Chin King, Cases, 379; Fong Yue Ting, *Ib.*, 382; United States v. Wong Kim Ark, *Ib.*, 381, note; Fok Yung Yo v. U. S., 1901, 185 U. S. 296.
2 Butler, Treaty-Making Power, 87–123, and notes (an elaborate and critical consideration of the status of the Chinese citizen and alien); Hart, 179–180; 1 Jones, 82; 2 *Ib.*, 68.

94. **Status of Indians in the United States.** Indian tribes designated by Marshall, C. J., in 1831, as "Domestic Dependent Nations" (The Cherokee Nation v. Georgia, 5 Peter's Rep., 1). Since 1871 no formal treaties have been made with tribes, and they have been subjected to the authority of Congress. In 1884, the Supreme Court held that an Indian born in a tribe, though having left it, was not a citizen, and that the Fourteenth Amendment did not apply to him. Compare provisions of acts of March 3, 1885, and February 8, 1887 (allotment of lands to Indians in severalty). Elk v. Wilkins, Cases, 398; U. S. v. Kagama, *Ib.*, 404; and see the case of Crow Dog, 109 U. S. 556.

1 Rawle's Bouvier, 1015–1016, 328; 2 Butler's Treaty-Making Power, ch. XIV.; Hart, 179–180, 196–197, 226; 1 Jones, 244, 2 *Ib.*, 229; 1 Thayer, Cases on Constitutional Law, p. 598, note; 2 Wharton's Digest, ch. VIII.

VII. International Agents of a State.

95. **Persons designated by the Constitution of a State to manage its Foreign Affairs. — Department of Foreign Affairs. — State Department, in the United States. Diplomatic Agents.** 1. Ambassadors, Legates, Nuncios. 2. Envoys and Ministers Plenipotentiary. 3. Ministers resident. 4. Chargés d'Affaires. The first three classes are accredited to the Sovereign, the fourth to the Minister of Foreign Affairs. Bonfils, §§ 648–651; Foster, Organization of the Department of State (Century of Am. Dip., pp. 103–135); Hall, 310–315; 2 Jones, 144; Liszt, 102–105; 1 Rivier, 426–428; Rivier, L. B., 256–257; Schuyler, The Department of State (Am. Dip., pp. 1–40); Snow, § 32; Taylor, §§ 276–288; 1 Twiss, 339–352.

96. **Rights of Diplomatic Agents. — Refusal to receive a Minister. — Must be a persona grata. — Credentials; Letters of Credence, Letters Patent; Full Powers; Instructions; Passport.** Bluntschli, §§ 159–190; Bonfils, §§ 663–680; 3 Calvo, § 312, *et seq.*; Hall, § 98; 1 Halleck, 325–329, 358–362; Heffter, §§ 201–204, 208–213; 218-221; Lawrence, 258-272; Liszt, 109–118, 111–112; 2 Phillimore, 156–198, 246-264; 1 Rivier, 453–475; Rivier, L. B., 269–274; Taylor, §§ 289–300; 1 Twiss, 336–339, 353–365; 1 Wharton's Digest, §§ 82–83; Woolsey, 126–135.

97. **Termination of Mission. — Recall and Dismissal.** Dupont v. Pichon, Cases, 208, note; Torladé v. Barrozo, *Ib.*, 208, note; Musurus Bey v. Gadban, *Ib.*, 208, note; The Dè Lome Incident, 32 Am. Law Review, 265–268.
Bluntschli, §§ 227–240; Bonfils, §§ 730–732; Hall, §§ 98–99; 1 Halleck, 363–366; Heffter, §§ 223–226, 227–240 (L'art diplomatique); Liszt, 112; 1 Rivier, 512–518; Taylor, §§ 320–323; Wharton's Digest, § 84; D. Wheaton, 250.

98. **The Rights and Immunities of Diplomatic Agents in Friendly States on the Way to or from their Posts.** Wilson v. Blanco, Cases, 206; New Chili Gold Mining Co. v. Blanco, *Ib.*, 207, note; see also Holbrook v. Henderson, 4 Sanford (N. Y.), 631.

Hall, §§ 99–101; 1 Halleck, 362; Heffter, § 207; Liszt, 112; 2 Phillimore, 215–218; Pomeroy, 421–423; Rivier, 508–512; Taylor, §§ 293–294; Twiss, 373–378.

99. **Consuls: Origin of Office. — Function. — Appointment. — Dismissal. Privileges. — Consuls diplomatically accredited. — "Lettres de Provision." — Exequatur.** *In re* Baiz, Cases, 197; Other Cases, *Ib.*, 205, note.
Bluntschli, §§ 244–275; Bonfils, §§ 733–775 (literature on subject, 376–378); 3 Calvo, §§ 1368–1431; Hall, §§ 105–106; 1 Halleck, 369–386; Hart, 245–246; Heffter, §§ 244–248; 1 Jones, 107, 2 *Ib.*, 93; Lawrence, 230–233, 272–274; Liszt, 119–125; 2 Martens, 95–121; 2 Phillimore, 265–336; Pomeroy, 443–451; 1 Rivier, 519–542, *Ib.*, 238; Rivier, L. B., 292–303; Snow, 58–60; Schuyler, Our Consular System (Am. Dip., 41–104); Taylor, §§ 325–330; 1 Twiss, 378–382; Wharton's Digest, §§ 113–124; D. Wheaton, § 120.

100. **Judicial Functions of Consuls in Semi-civilized Lands.** Ellis v. Mitchell, Cases, 234; Dainese v. U. S., 15 Ct. Cl. 64, Cases, 237, note; *in re* Ross, *Ib.*, 238; U. S. Rev. Stat., §§ 4083–4086, 4087–4089; Cases, 237, note.
Bonfils, §§ 776–791; 3 Calvo, §§ 1431 *et seq.*; Dunwell, Our Consular Courts in China, 34 Am. Law Review, 826–840; 1 Halleck, 386–400; 1 Jones, 107, 2 *Ib.*, 93; Liszt, 125–133; 2 Martens, 121–144; 2 Phillimore, 337–342; Pomeroy, 451–453; 1 Rivier, 543–558; Rivier, L. B., 303–308; Snow, 62; Taylor, § 333; Wharton's Digest, § 125.

VIII. Treaties.

101. **Nature and Kinds of Treaties. — Conditions necessary to the Validity of Treaties. — Authority of Persons contracting. — Freedom of Consent. — Intimidation. — Fraud, etc.** Foster & Elam v. Neilson, Cases, 412; Geofroy v. Riggs, *Ib.*, 413, and note; Hauenstein v. Lynham, *Ib.*, 419, note; Extradition Treaty, see Extradition, § 67, *et seq.*, *ante*, and Terlinden v. Ames, Cases, 436; Arbitration Treaty, *La Ninfa*, Cases, 443.
Bluntschli, §§ 402–424, 442; Bonfils, §§ 816–823, 861–929; 3 Calvo, §§ 1567 *et seq.*; Hall, §§ 108–109; 1 Halleck, 276–295; Heffter, §§ 83–88; Jellinek, Die rechtliche Natur der Staatsverträge, 1880; Die Lehre von den Staatenverbindungen, 1882, 100–113; Gesetz und Verordnung, 1887, 341–336; 1 Jones, 352–353, 2 *Ib.*, 500–501;

Liszt, 159–169; 1 Martens, 510–561; 2 Phillimore, 68–83; Pomeroy, 23 *et seq.*; 2 Rivier, 33–71, 106–118; Rivier, L. B., 320–331, 342–346; Schuyler, Commercial Treaties (Am. Dip., 421–457); Snow, § 33; Taylor, §§ 334–348, 374–376; 1 Twiss, 382–402; D. Wheaton, §§ 252–262; Woolsey, 159–164.

102. **Some Agreements in the Form of Treaties are not Subjects of International Law.** Bluntschli, § 443; Hall, § 107, and note.

103. **Forms. — Tacit and Express Ratification. — Refusal of Ratification. — Completion of Ratification.** Bonfils, §§ 824–831; Hall, 110; Hart, 211; Pomeroy, 332; 2 Rivier, 71–86; Rivier, L. B., 332–336; Taylor, §§ 361–367; 1 Twiss, 438–442; D. Wheaton, §§ 256–264.

104. **Interpretation of Treaties. Convention of 1818 between England and the United States (Fisheries), the Clayton-Bulwer Treaty (1850).** Adams v. Akerlund, Cases, 426, note; Tucker v. Alexandroff, *Ib.*, 426, note; Other Cases, *Ib.*, 426–427, note.
Adler, Interpretation of Treaties, 26 Law Magazine Review, 5th ser., 62–91, 164–171; Bonfils, §§ 835–844; Hall, §§ 111–112; 1 Halleck, 296–305; Heffter, § 95; Lawrence, Essays, 89–162; 2 Phillimore, 94–125; Pomeroy, 384–395; 2 Rivier, 122–125; Rivier, L. B., 346–348; Schuyler, The Fisheries (Am. Dip., 404–420); Taylor, §§ 377–390; D. Wheaton, § 287; Woolsey, 173–174.

105. **Conflict between Different Treaties; between Different Parts of the same Treaty; between Law and Treaty.** Sutton v. Sutton, Cases, 427; People v. Gerke, 5 Cal. 381, Cases, 420, note; Wunderle v. Wunderle, *Ib.*, 414; Whitney v. Robertson, *Ib.*, 422; Botiller v. Dominguez, *Ib.*, 426, note; compare U. S. v. Lee Yen Tai, 1901, 185 U. S. 213.
Bluntschli, § 414; 2 Calvo, §§ 720–723; Hall, § 112; 2 Phillimore, 126–132; Taylor, §§ 391–393.

106. **Treaties of Guarantee.** Bluntschli, §§ 437–440; Bonfils, §§ 870–912; Hall, § 113; Heffter, § 97; 2 Phillimore, 84–93; 2 Rivier, 94–105; Rivier, 338–341; Taylor, §§ 347–353; Woolsey, 166–170.

107. **Legislation necessary to carry Treaties into Effect. In the United States a Treaty is by Constitutional Provision the Law of the Land. Is the House of Representatives in the United States under Obligations to pass Acts necessary to carry Treaties into Effect? The Jay Treaty, 1794, the Alaska Treaty, 1867.** 1 Butler's Treaty-Making Power, ch. 10, 12; compare also ch. 11.

108. **A Treaty dates from Signing: in its Operation on Individual Rights, from the Date of Ratification.** Haver v. Yaker, Cases, 420; Davis v. Police Jury, *Ib.*, 421, note.

109. **The Obligation of Treaties. — Difference between a Void and a Voidable Treaty. — Test of Voidability.** Bernard, Lectures on Diplomacy (1868), 168; Bluntschli, §§ 415, 456–461; Creasy, 40–44; Hall, 364–375, Heffter, § 98; 1 Halleck, 324; Maine, Ancient Law, 23; 2 Phillimore, 76; Pomeroy, 347; Taylor, §§ 363, 394–398; Wharton's Digest, § 137 *a*.

110. **Most Favored Nation Clause in Commercial Treaties.** Whitney v. Robertson, Cases, 422; Herod, Favored Nation Treatment, an Analysis of the Most Favored Nation Clause, 1901; Kasson, Reciprocity, 1901; Liszt, 164–166; Wharton's Digest, § 134.

111. **Extinction and Renewal of Treaties.** Sutton v. Sutton, Cases, 427; Society for Propagation of Gospel v. Wheeler, *Ib.*, 428; Hooper v. U. S., *Ib.*, 433; Terlinden v. Ames, *Ib.*, 436.
Bonfils, §§ 851–860; Hall, § 117; Liszt, 166–169; Pomeroy, 356 *et seq.*; 2 Rivier, 126–146; Rivier, L. B., 349–356; Taylor, §§ 399–400.

IX. Amicable Settlement of Disputes and Attempts to mitigate the Harshness and Hardships of War.

112. **Arbitration.** *La Ninfa*, Cases, 443; Pious Fund Case, *Ib.*, 449, note.
Amos, Political and Legal Remedies for War; Bluntschli, §§ 488–498; Bonfils, §§ 944–970 (literature, especially articles in foreign periodicals); 3 Calvo, §§ 1706 *et seq.*; Rouard de Card, L'Arbitrage international, 1876; Creasy, 394–399; Hall, 378–380 (literature, note on 380); 1 Halleck, 102, 467–468, 485–487; Holls, The Peace Conference at The Hague, 1900; 1 Jones, 21, 2 *Ib.*, 19–20; Lapardelle, La conférence de la paix, 1900; Lawrence, Evolution of Peace (Essays, 234–277); Lawrence, 672–677; Liszt, 148, 279–283; Maine, 207–228; 3 Martens, 138–155; Mérignhac, Traité théroique et pratique de l'arbitrage, 1895; Moore, International Arbitration, 1898 (especially Vol. 5, "Treaties Relating to Arbitrations to which the United States has been a Party;" "Historical Notes," — a history of arbitration to date of publication); 3 Phillimore, 1–17; Revon, L'arbitrage international, 1892; 2 Rivier, 166–188; Rivier, L. B., 366–372; Snow, § 38; Taylor, §§ 33, 356–383.

113. **Mediation.** Bluntschli, Introduction, p. 30, §§ 108–114, 481–487; Bonfils, §§ 931–943; 3 Calvo, §§ 1682, *et seq.*; Heffter, §§ 106–108; Holls, 176–203; Liszt, 276–279; 1 Martens, 534–538; 3 *Ib.*, 132–138; Rivier, L. B., 363–366; Snow, § 34; Taylor, §§ 359–360; 2 Twiss, 12–16.

114. **International Acts and Movements with a View to mitigate the Rigors of War.** 1. The Declaration of Paris, 1856, 2 Twiss, 512–524; 2. The Geneva Convention, 1864, 2 Twiss, 524–557; Convention of 1868; 3. The Declaration of St. Petersburg, 1868, 2 Twiss, 557–561; 4. The Brussels Congress, 1874, 7 R. D. I., 87, 438; 5. The Hague Conference, 1899; Holland, Studies, 59–78; Holls, Hague Conference; 93, 134; Maine, 123–142; 2 Rivier, 260–273; Taylor, §§ 35–36.

PART II.

INTERNATIONAL RELATIONS AS MODIFIED BY WAR.

I. Means Short of War — Definition of War — Declaration of War.

115. **Reprisals. — Retorsion. — Pacific Blockade.** The *Nereide*, Cases, 451; Gray v. U. S., *Ib.*, 452; Case of Don Pacifico, 1850, *Ib.*, 461, note; Other Cases, *Ib.*; Retorsion, Cases, notes, 459-463; Pacific Blockade, *Ib.*, 463 note.
Barclay, Les blocus pacifiques, 29 R. D. I., 474; Bluntschli, §§ 499–508; Bonfils, §§ 972–994; 3 Calvo, §§ 1809 *et seq.*; Creasy, 400–404; Hall, 381–390; 1 Halleck, 470–474, 2 *Ib.*, 109; Heffter, §§ 110–112; Holland, Studies, 130–150; 1 Jones, 429, 2 *Ib.*, 378–427; Lawrence, 293–295, 297–298; Liszt, 283–286; 3 Phillimore, 18–43; 2 Rivier, 189–199; Rivier, L. B., 372–376; Snow, §§ 35–37; Taylor, §§ 435–437, 444–446; 2 Twiss, 18–38; Walker, Science, 154–158; D. Wheaton, §§ 290–292, and note no. 151; L. Wheaton, 501–510, and note no. 168; Woolsey, 181–187.

116. **Hostile Embargo.** *Boedes Lust*, Cases, 460 and 463 note.
3 Calvo, §§ 1824 *et seq.*; Creasy, 435; Hall, § 120; 1 Halleck, 481; Heffter, § 111; Lawrence, 295–297; 3 Phillimore, 44–49; Taylor, §§ 431–434; D. Wheaton, § 293, and note no. 152; L. Wheaton, 510, and note no. 169; Woolsey, 180.

117. **Declaration of War. — War without a Declaration. — Civil War. — Date of the Beginning of a War.** Dole v. Merchants Mutual Marine Ins. Co., Cases, 470; The *Panama*, *Ib.*, 474, note; The Prize Cases,

Ib., 475; Matthews v. McStea, *Ib.*, 508; Other Cases in note, *Ib.*, 480–482.

Bluntschli, § 529; Bonfils, §§ 1027–1065; 4 Calvo, §§ 1899 *et seq.*; Creasy, 405–407; Hall, 390–399; 1 Halleck, 521–526, 540–542; Heffter, § 121; 1 Jones, 571, 2 *Ib.*, 519–520; Lawrence, 299–301; Liszt, 287–297; Maurice, Hostilities without Declaration of War, 1883; Owen, Declaration of War, 1889; 3 Phillimore, 85–113; de Saint Croix, De la déclaration de guerre et ses effets immédiâts, 1892; Taylor, §§ 24, 455, 456; 2 Twiss, 65–66; Wiesle, Le droit international appliqué aux guerres civiles, 1898; Woolsey, 187–193.

118. **Definition of War. — Its Object. — Causes of War. — Kinds of War.** U. S. v. The *Active*, Cases, 464; The *Teutonia*, *Ib.*, 471.

Baty, Conditional War, 24 Law Magazine and Review, 5th ser., 336–440; Bluntschli, §§ 510–528; Bonfils, §§ 995–1026; 4 Calvo, 1–40 (résumé of opinions of writers); Creasy, 360–392; 1 Halleck, 488–520; Lawrence, 290–293; Maine, 131, 132; 3 Martens, §§ 106–109; 3 Phillimore, 77–84; Pillet, Les lois actuelles de la guerre, 1898; 2 Rivier, 200–235; Rivier, L. B., 377–389; Snow, §§ 39–41; Taylor, §§ 448–454; 2 Twiss, 43–45; D. Wheaton, § 296; Woolsey, 210.

II. Effects of War as Between Enemies.

(*a*) *Laws and Usages of War. — Conduct of Hostilities.*[1]

119. **Who are Enemies in a War? One Theory is that all Citizens or Subjects of one Belligerent State are the Enemies of all the Citizens or Subjects of the other. Another Theory is that War is a Contest between States, and that Private Individuals of the Belligerent States are not Enemies at all. The First is the Old View, and is still supported by the Better Authority.**

Bluntschli, §§ 529–530; Bonfils, §§ 1050–1056; Calvo, §§ 2035–2036; Creasy, 376–338; Hall, § 18; 1 Halleck, 526–527; Holland, Studies, 41–58, 78–96; Holls, 141; 1 Jones, 571, 2 *Ib.*, 519–520; Lawrence, 314–322; Liszt, 287–288; Maine, 143–160; Taylor, § 451; Walker, Science, 237; Woolsey, 550.

120. **All Peaceful Relations between Belligerent States and their Citizens cease on the Outbreak of War. — Modern Usage permits Alien**

[1] For the Regulations proposed by The Hague Conference, now adopted as law by the United States, see Holls, pp. 139–161; also Butler's Treaty-making Power, II., pp. 528–531.

Enemies to remain in the Territory Unmolested unless their Presence becomes Dangerous to the State. Clarke v. Morey, Cases, 541, note, and 545, note.
Bonfils, §§ 1045–1055; Calvo, §§ 1912–1914; Hall, §§ 121–123; 1 Halleck, 527–532; Heffter, 289, and note 9; Legal Effect of a Declaration of War, 32 Am. Law Review, 574–577; Liszt, 293–294; 3 Phillimore, 128–130; 2 Rivier, 235–238; Rivier, L. B., 389–391; Taylor, § 463; 2 Twiss, 86–87; Woolsey, 194–198.

121. **Who are Non-Combatants?** Bluntschli, §§ 578, 595; Bonfils, §§ 1141–1154; Hall, 412–413; 1 Halleck, 554–555, 561; Liszt, 300; 2 Rivier, 248–251; D. Wheaton, 431, and note no. 168; Woolsey, 216–221.

122. **Who are Lawful Combatants? — Conditions. — Authority. — Organization — Dress.** Bluntschli, §§ 569–573; Bonfils, §§ 1088–1140; 4 Calvo, 131–140; 1 Halleck, 553–562; Liszt, 301–302; 2 Rivier, 251–253; Rivier, L. B., 395–396; Taylor, §§ 471–478; Walker, Science, 249; Woolsey, 214–215.

123. **Maritime War. — Privateers. — Letters of Marque and Reprisal. — Volunteer Navy.** Cases, notes, 459–463; *Ib.*, 899–901, note.
Bluntschli, §§ 664–673; Bonfils, §§ 1268–1440; 4 Calvo, §§ 2297 *et seq.*; Creasy, 536–549; Dupuis, Le droit de la guerre maritime d'après les doctrines anglaises contemporaine, 1899; Hall, §§ 180–184; 2 Halleck, 108–123; Heffter, § 124; 1 Jones, 358, 446, 2 *Ib.*, 324, 407; Liszt, 317–318; Maine, 93–109; Phillimore, 502–514; 2 Rivier, 253–259; Snow, §§ 41–42; Taylor, §§ 438–439, 494–507, 545–567; 2 Twiss, 25–27, 138–189, 374–424; Wharton, Digest, §§ 383–385; D. Wheaton, § 358, and note 173; L. Wheaton, 626–649; Woolsey, 201–208.

124. **Prisoners of War. — Who may be taken Prisoners? — Treatment. — Parole. — Exchange. — Ransom.** Bluntschli, §§ 593–626; Bonfils, §§ 1117–1141; 4 Calvo, 189–204; Creasy, 452–458; Davis, 233–237; Hall, §§ 131–135; 2 Halleck, 14–39, 326–333; Holls, 145; 1 Jones, 445, 2 *Ib.*, 380, 520; Lawrence, 333–337; Liszt, 307–309; Maine, 160–175; 3 Martens, 236–239; 2 Rivier, 273–279; Rivier, L. B., 404–406; Romberg, Des belligérants et des prisonniers de guerre, 1874; Taylor, §§ 520–528; 2 Twiss, 350–352; D. Wheaton, 426–431; L. Wheaton, 586–593.

125. **Care of the Sick and Wounded. — Geneva Convention. — Red-Cross Society. — The Hague Conference.** Bluntschli, §§ 586–592; Bon-

fils, §§ 1108–1119; Boyland, Six Months under the Red Cross; (1873); 4 Calvo, §§ 2034 *et seq.*; Cauwès, L'extension des principes de la convention de Genève aux guerres maritimes, 1899; Hall, §§ 130–131; 2 Halleck, 36–39; Holland, Studies, 59–79; Holls, 127; Lawrence, 337–339; Liszt, 309–312; Maine, 123–143; 3 Martens, 239–248; Moynier, Le croix-rouge, 1882; Müller, Entstehungsgeschichte des roten Kreutzes und der Genfer Konvention, 1897; 3 Phillimore, 157–160; 2 Rivier, 268–273; Rivier, L. B., 402–403.

126. **Instruments of War. — Means of Destruction.** Bluntschli, §§ 557–560; Bonfils, §§ 1066–1077; 4 Calvo, 147–149; Hall, §§ 182–186; 1 Halleck, 553–566; Heffter, § 125; 2 Jones, 519; Liszt, 304–305; 3 Martens, 207 *et seq.*; 3 Phillimore, 160–163; 2 Rivier, 260–268; Rivier, L. B., 399–401; Snow, § 44; Taylor, 479–482; Woolsey, 211–213.

127. **Devastation. — Is it ever Lawful?** Bonfils, §§ 1227–1230; 4 Calvo, 244–253; Hall, §§ 186–187; Lawrence, 440, 444; 2 Rivier, 265, 318, 335; Taylor, 483–486.

128. **Bombardment of Towns. — Fortified. — Open.** Bluntschli, §§ 552–554, *bis;* Bonfils, §§ 1078–1087; Calvo, §§ 2067–2095; Davis, 219–222; Hall, §§ 186–187; Holland, Studies, 96–111; Liszt, 306; Holls, 152; Taylor, §§ 484–487; Woolsey, 223–224. The important cases will be found in Calvo.

129. **Deceit. — Spies. — Balloons.** Bluntschli, §§ 627–636; Bonfils, §§ 1072–1075, 1099–1107; 4 Calvo, 2106–2126; Davis, 241–244; G. Friedmann, Die Lage der Kriegskundschafter und Kriegspione, 1892; Hall, §§ 187–188; 1 Halleck, 566–574; Liszt, 303–304; Holls, 95, and 153; 3 Martens, 249; 2 Rivier, 249; 261, 280–284; Rivier, L. B., 407; Taylor, 490–494.

(*b*) *Effect of War upon Property, and Commercial Relations with the Enemy.*

130. **When War breaks out between two States, the Movable or Personal Property of Citizens of either, found in the Territory of the other, on Land, is by the Old and Strict Rule of War confiscable. — Debts due to Citizens of the Enemy State shared the Same Fate. In modern Practice, however, this Rule has become nearly obsolete.** Hamilton v. Eaton, Cases, 481; Ware v. Hylton, *Ib.*, 485, note;

Brown v. U. S., *Ib.*, 486, and note, 494; *Ex parte* Boussmaker, *Ib.*, 494; Wolff v. Oxholm, *Ib.*, 496, and note, 497.
Bonfils, §§ 1204–1206; 4 Calvo, §§ 1915–1925; Hall, §§ 141–147; 1 Halleck, 532–539; Heffter, § 140; Liszt, 314; 3 Martens, 197–206; 3 Phillimore, 128–148; 2 Rivier, 306, 318 *et seq.*; Rivier, L. B., 422–423; Snow, § 45; Taylor, §§ 539–557; 2 Twiss, 122–125; D. Wheaton, §§ 298–308, and notes no. 156–157; Woolsey, 194–198.

131. **Property of the Enemy found afloat in Ports, on the breaking out of War was generally Confiscable as Prize until a very Recent Time. But here, too, later Practice would seem to have discarded the Harsher Rule. Compare with Embargo,** — Case of Boedes Lust, Cases, 460; *Brown* v. *U. S.*, *Ib.*, 486; The *Johanna Emilia*, Cases, 498, note.
Hall, §§ 141–144; Lawrence, 282–416; Maine, 105, 117; 3 Phillimore, 132; Taylor, 560–561; D. Wheaton, 389, note; L. Wheaton, 531, and note no. 173.

132. **Debts of a State due to the Enemy and the Interest thereon are not Confiscable.** Case of the Silesian Loan, 1752 (2 Martens, Causes Célèbres, 97), Cases, 461, note.
Bonfils, §§ 1056–1059; Calvo, §§ 1924–1925; Hall, § 141; 1 Halleck, § 533–537; 3 Phillimore, 148; Taylor, § 552; D. Wheaton, 388–391, and see note no. 157.

133. **Immovable Property — Lands and Houses — of the Enemy within the Limits of the Other Belligerents are never confiscated.** Calvo, §§ 1922, 2193–2293; Hall, § 144; 2 Halleck, 58–79; Liszt, 814; Maine, 192–206; 3 Martens, 148, 260–266; Taylor, §§ 539–557.

134. **Property of the Enemy found on the Sea or in the Ports of the Enemy, is Confiscable as Prize of War. — Modified by Declaration of Paris, 1856.** (Cases, 898, note.)
Bluntschli, §§ 42–47, and §§ 664–673; Bonfils, §§ 1281–1361; 4 Calvo, §§ 2379–2410; Dupuis, Le droit de la guerre maritime d'après les doctrines anglaises contemporaines, 1899; Hall, §§ 143, 146; 2 Halleck, 80–123; Liszt, 323–325; 3 Martens, 291–296; 3 Phillimore, 560; 2 Rivier, 330–313; Rivier, L. B., 426–428; Taylor, §§ 558 *et seq.*; D. Wheaton, 382–383; Woolsey, 200.

135. **The Effect of War upon Contracts between Enemies made before the War: Executed Contracts; Executory Contracts; Statutes of Limitation; Interest on Debts.** Hoare v. Allen, Cases, 498;

Hanger v. Abbott, *Ib.*, 500; Matthews v. McStea, *Ib.*, 508; Griswold v. Waddington, *Ib.*, 504; N. Y. Life Ins. Co. v. Statham, *Ib.*, 512, and note, 516; Ware v. Jones, *Ib.*, 517, and note, 520; Perkins v. Rogers, *Ib.*, 554. See also Gamba v. Le Mesurier, 4 East, 407.
Bonfils, §§ 1064–1065; Calvo, §§ 1926, 2316; Hall, § 126; 1 Halleck, 527; 3 Martens, 201–202; 1 Kent, 68; 3 Phillimore, 179, 798, 866; 2 Rivier, 231, 235; Snow, § 46; Taylor, 459–460; D. Wheaton, 403; L. Wheaton, 556.

136. **Effect of War upon Treaties between the Belligerent States.** Sutton v. Sutton, Cases, 427; Society for the Propagation of the Gospel v. New Haven, *Ib.*, 428, and note; Hooper, Adm'r, v. U. S., *Ib.*, 433.
Bluntschli, § 538; Bonfils, § 1049; Hall, §§ 124–126; 1 Halleck, 294–543; Heffter, § 122; Liszt, 168; 3 Phillimore, 792–811; 2 Rivier, 137–141; Rivier, L. B., 354–355; Taylor, 368–369, 460–461; D. Wheaton, 352, and note; L. Wheaton, 460–477.

(*c*) *Trade with the Enemy.*

137. **Trade or Intercourse is wholly interdicted, and is in all Cases Illegal, unless under a License of the State.** The *Hoop*, Cases, 521; Potts v. Bell, *Ib.*, 525; Flindt v. Scott, *Ib.*, 526, and note, 499; Williams v. Marshall, *Ib.*, 530; De Jarnett v. De Giversville, *Ib.*, 542, and note, 545.
Bonfils, §§ 1059–1065; Calvo, §§ 1926–1929; Hall, § 126; 2 Halleck, 124–140; Heffter, § 123; 1 Kent, 66–69; 3 Phillimore, 116–120; 2 Rivier, 231; Snow, § 47; Taylor, §§ 463–464; D. Wheaton, §§ 309–317, and note no. 158; White, Trading with the Enemy, 16 Law Quarterly Review, 397–413; Woolsey, 255.

138. **License to trade must, as a Rule, be granted by the Supreme Authority of the State, and must be granted or assented to by both Belligerents.** The *Sea Lion*, Cases, 531; Coppell v. Hall, *Ib.*, 534, note; Hamilton v. Dillin, *Ib.*, 534, note.
Bonfils, §§ 1061–1065; 4 Calvo, § 1930, and notes; Hall, §§ 195–196; 2 Halleck, 344–349; Magoon, Military Occupation, 210–255; Taylor, §§ 509–515; D. Wheaton, 502–504, and note no. 198; Woolsey, 256.

139. **After the Outbreak of War, a Citizen may neither go in Person nor send an Agent to the Enemy's Country to bring away his Property.** The *Rapid*, Cases, 557; The *St. Lawrence*, *Ib.*, 559; Amory v. McGregor, *Ib.*, 561.
2 Halleck, 126–127.

140. **Citizens residing within the Enemy's Country should return Home on the Outbreak of the War, and should be granted a Reasonable Time to withdraw their Property and return.** The *Brig Joseph*, Cases, 556; The *St. Lawrence*, *Ib.*, 559; Amory v. McGregor, *Ib.*, 561; The *William Bagalay*, *Ib.*, 565, and note.
2 Halleck, 129.

141. **Contracts entered into with Enemies during War by Citizens residing in the Enemy's Country.** Kershaw v. Kelsey, Cases, 535.
4 Calvo, §§ 1930 *et seq.*, and notes; 3 Phillimore, 120–121; D. Wheaton, 403.

142. **Bills of Exchange drawn by a Citizen, while a Prisoner in the Enemy's Country, upon a Person in his own Country, and sold to an Enemy are not regarded as Trading with the Enemy, — at least they may be enforced.** Antoine v. Morshead, Cases, 573; Daubuz v. Morshead, *Ib.*, 575, note.
1 Halleck, 529; 1 Kent, 67; D. Wheaton, § 317.

143. **Agents may represent and bind their Principals in the Enemy's Country, if appointed before the Outbreak of War; if appointed during the War, their Contracts are void.** Small v. Lumpkin, Cases, 538; U. S. v. Grossmayer, *Ib.*, 541, note.

144. **Insurance on Ships or Property of the Enemy.** Furtado v. Rodgers, Cases, 549; Other Cases in note, 553.
2 Halleck, 140; Pennant, Insurance of Enemies' Property, 18 Law Quarterly Review, 289–296.

145. **Ransom Contracts, Ransom Bill, Safe Conduct constitute Exceptions to the Rule against Trading with the Enemy.** Cornu v. Blackburn, Cases, 566; The *Charming Nancy*, *Ib.*, 568; The *Patrixent*, *Ib.*, 569, and note; Goodrich & De Forrest v. Gordon, *Ib.*, 571. See also Anthon v. Fisher, *Ib.*, 570, note.
Bonfils, §§ 1237–1258; 4 Calvo, §§ 2422–2429; Hall, §§ 151–152; 2 Halleck, 330–333; Lawrence, 446–449; Maisonnare v. Keating, 2 Gall. 337; 3 Phillimore, 177–179, 644–647; Taylor, 506–522; D. Wheaton, § 411, and note no. 199; Woolsey, 245–247.

146. **Pacific Intercourse of Belligerents. — Commercia Belli: Flags of Truce. — Truces. — Passports. — Armistices. — Cartels. — Capitulations. — License to Trade. — Ransoms.** Crawford v. The *William Penn*, Cases, 575; Crawford & McLean v. The *William Penn*, *Ib.*,

580; Scholefield & Taylor v. Eichelberger, *Ib.*, 580, note. Other Cases in note, 584–585.
Bluntschli, §§ 674–699; Calvo, §§ 2411–2452; Hall, §§ 189–196; 2 Halleck, 310–334; Lawrence, 450–456; Liszt, 303, 315–316; Maine, 83–191; 2 Rivier, 360–368; Rivier, L. B., 433–436; 3 Phillimore, 179–188; Taylor, §§ 506–522; D. Wheaton, §§ 399–408; Woolsey, 225, 255–260.

(*d*) *Commercial Domicile. — National Character of Property.*

147. **The National Character of Property in Time of War, depends upon the Domicile of the Owner. — French Rule.** The *Indian Chief*, Cases, 588; The Prize Cases, *Ib.*, 601, and 604, note; The *Venus*, *Ib.*, 591; *Le Hardy*, *Ib.*, 605, note.
Calvo, §§ 656, 679, 1933, 2 Halleck, 414, 424; 1 Jones, 168–169; Liszt, 325; 2 Rivier, 342; Snow, § 48; Taylor, §§ 209, 523, 554; L. Wheaton, 557–571; Woolsey, 296.

148. **What constitutes Domicile. — How determined. — Animus manendi. — Time.** The *Harmony*, Cases, 585; Mitchell v. U. S., *Ib.*, 605.
4 Calvo, §§ 1936–1945; Hall, § 168; 1 Halleck, 415–422; 1 Jones, 168–169; 3 Phillimore, 725–734; D. Wheaton, §§ 318–332; L. Wheaton, 558–560.

149. **House of Trade takes the National Character of the Country in which it is Established. — Exception: House of Trade in a Neutral State, and the Partners, or some of them, Reside in an Enemy Country.** The *Antonia Johanna*, Cases, 604, note; The *Freundschaft*, *Ib.*, 604, note.
Calvo, §§ 695, 1936; Hall, § 168; D. Wheaton, § 334; L. Wheaton, 557 *et seq.*, and note no. 180.

150. **The Product of the Enemy's Soil takes the National Character of the Country where it is Produced.** Bentzen v. Boyle, Cases, 598. Bonfils, § 1359; Hall, §§ 168–169; Liszt, 325; 2 Rivier, 344–345; D. Wheaton, §§ 336–339; L. Wheaton, 576–580.

(*e*) *Ownership of Goods in transitu, on the Ocean, in Time of War.*

151. **In Time of War, or in Contemplation thereof, Goods shipped on Contract are at the Risk of the Consignee during Transit. The French Rule permits the Shipper to take the Risk by Agreement.**

The *Sally*, Cases, 607; The Packet *De Bilboa*, *Ib.*, 609; The *Anna Catharina*, *Ib.*, 612; The *San Jose Indiano*, *Ib.*, 614; *Les Trois Frères*, *Ib.*, 615, note.
Bonfils, § 1355; 4 Calvo, §§ 2315–2320; Hall, §§ 172–173; 2 Halleck, 84–88; 1 Jones, 489, 490; 2 *Ib.*, 443; 1 Kent, 87; 3 Phillimore, 740–745; Snow, § 495; Taylor, § 553.

152. **Transfer in Transitu. — Stoppage in Transitu. — According to the Rule of the English and American Prize Courts, Property, if Hostile at the Time of Shipment, cannot change its Character during Transitu by Sale to a Neutral.** The *Vrow Margaretha*, Cases, 616; The *Jan Frederick*, *Ib.*, 618; The *Ann Green*, *Ib.*, 620; The *Francis and Cargo*, *Ib.*, 621, note; The *Benito Estenger*, *Ib.*, 621, and note, 628.
Bonfils, §§ 1356–1360; 4 Calvo, §§ 2321, 2322 (dissents from the English and American view); 1 Duer, "On Insurance," 441–444; Hall, 171–172; 2 Halleck, 90–92; 1 Jones, 527, 2 *Ib.*, 472; 3 Phillimore, 739–740; Taylor, 568.

153. **National Character of Merchant Ships, and their Transfer during War from a Belligerent to a Neutral.** Bonfils, §§ 1344–1349; 4 Calvo, §§ 2327–2338; Hall, § 171; 2 Halleck, 92–95; 1 Jones, 265, 489; Liszt, 324; 3 Phillimore, 734–739; Snow, § 50; Taylor, § 696.

154. **Proofs of the National Character of Merchant Ships.** Bonfils, §§ 597–606; 4 Calvo, §§ 2339–2366; Hall, 756, note (3d ed., 753–758); 2 Halleck. 98–105; Taylor, §§ 308, 309, 408, 568; 3 Wharton, Digest, §§ 409–410.

155. **Fishing Boats are generally exempt from Seizure, but the Exemption does not extend to Vessels employed in the Great Fisheries.** The *Paquette Habana*, Cases, 19.
Bonfils, § 1350; Calvo, §§ 2368–2373; Hall, § 148; 2 Halleck, 106; Liszt, 325; Taylor, §§ 558–559; D. Wheaton, 431, and note no. 168; L. Wheaton, 596, note no. 187; Woolsey, 303.

156. **Freight in the Case of Captured Vessels.** The *Vrow Henrica*, Cases, 629; The *Fortuna*, *Ib.*, 631; The *Antonia Johanna*, *Ib.*, 632; Hooper, Adm'r, v. U. S., *Ib.*, 633; The *Carlos F. Roses*, *Ib.*, 637; The *Siren*, *Ib.*, 648, note.
1 Jones, 342, 508; Taylor, §§ 629 n, 707, 565, 568, 578, 702, 703, 744, 745, 746.

(*f*) *Recapture. — Salvage. — Postliminium. — Rescue.*

157. **Recapture. — Salvage. — When does Title to recaptured Property vest in the Captor?** The *Santa Cruz*, Cases, 649; The *Carlotta*, *Ib.*, 650; The *Bearer*, *Ib.*, 653, and 654, note.
Bonfils, §§ 1416–1421; Creasy, 564; Hall, § 166; 2 Halleck, 500–527; 1 Kent, 108–109; Liszt, 327; 3 Phillimore, 613–643; 2 Rivier, 357; Rivier, L. B., 433; Taylor, § 576; D. Wheaton, 456–475; L. Wheaton, 524, 638–668; Woolsey, 247–252.

158. **Rescue by Neutrals.** The *Mary Ford*, Cases, 652, and note; The *Emily St. Pierre*, *Ib.*, 655, note; The *Lone*, *Ib.*, 655, note.
Bonfils, 1485–1487; Taylor, § 575; D. Wheaton, 475, note, 476–477, and note; L. Wheaton, 668; Woolsey, 359.

(*g*) *Enemy Property on Land. — Military Occupation.*

159. **Public Property of the Enemy, — Lands, Buildings, Archives, Work of Art, — Movable or Personal Property.** Mohr and Haas v. Hatzfield, Cases, 674, note.
Bluntschli, §§ 652–662; 4 Calvo, §§ 2201–2214; Creasy, 513 *et seq.*; Hall, §§ 136–138; 2 Halleck, 58–66; Liszt, 314; Magoon, Military Occupation, 264–281; Taylor, §§ 485, 539, 543, 545–546; D. Wheaton, 438, note; Woolsey, 194–197.

160. **Private Property, Real and Personal, as a Rule, is not Confiscable, at least not by Way of Booty, though Personal Property may be taken by Way of Contributions and Requisitions. — Comparison in respect to the Different Rule applied to Enemy's Property at Sea and on Land.** Kirk v. Lynd, Cases, 899, note; U. S. v. Winchester, *Ib.*, 899, note; Oakes v. U. S., *Ib.*, 899, note; see also Commodore Stewart's Case, *Ib.*, 910; Titus v. U. S., *Ib.*, 94, note; Whitfield v. U. S., 92 U. S., 165.
Barclay, Proposed Immunity of Private Property at Sea from Capture by Enemy, 16 Law Quarterly Review, 16–23; Bluntschli, § 665; Bonfils, §§ 1195 *et seq.*; 4 Calvo, §§ 2294 *et seq.*; Creasy, 536–556; Hall, §§ 139 *et seq.*; 2 Halleck, 66–75; Heffter, § 133; 1 Jones, 447; T. J. Lawrence, Essays, No. 1; Liszt, 312–314; Magoon, 264–280; 2 Rivier, 306, 318–324; Rivier, L. B., 422–423; Snow, § 51; Taylor, 547, 551 *et seq.*, 462; D. Wheaton, § 335, and note no. 171; L. Wheaton, 884.

161. **Requisitions and Contributions in Land Wars. — Will they be resorted to in Maritime Wars?** Bluntschli, §§ 653–686; Bonfils,

§§ 1207–1226; Calvo, §§ 2231–2235; Creasy, 530–554; Edwards, "The Germans in France," p. 59; Hall, §§ 140–143; 2 Halleck, 56, 69, 310; Heffter, 301; Lawrence, 374–376, 458; Magoon, Military Occupation, 217, 345–350; Maine, 200; Sherman, "Memoirs," II., 175, 181–184, 207, 227; Taylor, §§ 548–550, 558; Twiss, 124; Woolsey, 220.

162. **The Bombardment of Towns.** Bluntschli, §§ 554–556; Bonfils, §§ 1081–1086; Calvo, §§ 2085, 2092; Hall, § 186; Heffter, 281; Holland, Studies, 96–111; Holls, 152; Liszt, 306; 2 Rivier, 284–288; Rivier, L. B., 408–409; Taylor, §§ 484–485; Woolsey, 224.

163. **Military Occupation. — The General Character of the Right and Jurisdiction of an Invader over the Territory occupied by his Armies. — Old Theories. — Modern View.** Bluntschli, §§ 539–541; Bonfils, §§ 1155–1176; Calvo, §§ 2166–2198; Creasy, 502–512; Hall, §§ 153–155; 2 Halleck, 432–466; Heffter, 298, 304–308; Lawrence, 350 *et seq.*; Liszt, 312; Magoon, Military Occupation, 1902 (practice of United States); Maine, 177; Martens, 250–266; 2 Rivier, 299–318; Rivier, L. B., 413–419; Snow, § 52; Taylor, 127 *et seq.*, 584 *et seq.*; Woolsey, 252.

164. **Relation of the Territory occupied to the Government of the Invader. — To that of the State Invaded.** U. S. v. Rice, Cases, 655; Cross v. Harrison, *Ib.*, 658, note; Fleming v. Page, *Ib.*, 659; Jecker v. Montgomery, *Ib.*, 664; Leitensdorfer v. Webb, *Ib.*, 665, note; Other Cases in note, 665–666; Villasseque's Case, *Ib.*, 675, note. Bonfils, §§ 1156–1162; Creasy, 496; Hall, § 167; 2 Halleck, 450; Liszt, 313.

165. **De Facto and Constructive Occupation.** Creasy, 503; Hall, § 161; Walker, Science, 344–346.

166. **Rights of the Occupier over the Persons of the Territory Occupied. — "War Rebel."** 4 Calvo, §§ 2166 *et seq.*; Creasy, 516; Hall, §§ 155–158; 2 Halleck, 451–455; Lawrence, 344–345; Liszt, 313.

167. **Right of the Invader over Incorporeal Things, as Debts, etc.** Bonfils, §§ 1191–1193; 4 Calvo, §§ 2286, 2288; Hall, § 138; 2 Halleck, 460; 3 Phillimore, 832–840; 2 Rivier, 307–310; 2 Twiss, 62 *et seq.*

(*h*) *Termination of War. — Conquest. — Cession.*

168. **What marks the Date of the End of a War? — Treaties of Peace. — Proclamations in Civil Wars.** Bain v. Speedwell, Cases, 675; The *Thétis*, *Ib.*, 675, note; The *Protector*, *Ib.*, 682.

Bonfils, §§ 1692 *et seq.*; Calvo, §§ 3153–3154; Hall, § 197; Heffert, § 176; Liszt, 295; 3 Phillimore, 770; 2 Rivier, 443 *et seq.*; Rivier, L. B., 463, 464; Snow, § 54; Taylor, § 580; D. Wheaton, §§ 507, 546; Woolsey, 158.

169. **Effect of Treaties of Peace in settling General Rights and Obligations of the Parties. — Effect upon Acts done before the War. — Upon Acts done during the War. — Upon Acts done subsequently to the Treaty of Peace.** *Neustra Señora De Los Dolores*, Cases, 681; The *Mentor*, *Ib.*, 676; The *John*, *Ib.*, 677; The *Nymph*, *Ib.*, 676, note; The *Swineherd*, *Ib.*, 677, note.
Bluntschli, §§ 709–712; Calvo, §§ 3155–3159; Hall, §§ 197–202; Heffter, §§ 179–183; 2 Halleck, 306–324; Liszt, 296–297; 3 Phillimore, 770–784; 2 Rivier, 454, 458; Rivier, L. B., 465–468; Taylor, § 581; Woolsey, 263–266.

170. **Postliminium. — Uti possidetis. — How do they apply to Territory?** Bonfils §§ 3167 *et seq.*; Creasy, 564; Hall, §§ 162–166; 1 Halleck, 321, 2 *Ib.*, 602; Heffter, §§ 188–190; Lawrence, § 209; Liszt, 296; 3 Phillimore, 615; 2 Rivier, 459; Rivier, L. B., 468; Snow, § 55; Taylor, 574–576; D. Wheaton, § 398; Woolsey, § 151.

171. **Conquest. — Cession.** Elector of Hesse Cassel's Case, Cases, 675, note; Am. Ins. Co. v. Canter, *Ib.*, 657; U. S. v. Moreno, *Ib.*, 666; Fourteen Diamond Rings v. U. S., *Ib.*, 667; "Insular Cases," *Ib.*, 674, note; Bonfils, § 535; 4 Calvo, §§ 2452–2490; Hall, §§ 204–205; 2 Halleck, 466–499; Heffter, § 133; Liszt, 295; Magoon, Military Occupation, 262–264; A. P. Morse, Status of Territory acquired by the United States, 39 Am. Law Register (N. S.), 332–339; 2 Rivier, 435–442; Rivier, L. B., 458–462; Westlake, The Nature and Extent of the Title by Conquest, 17 Law Quarterly Review, 392–401; D. Wheaton, note 169; Woolsey, § 153.

III. Relations between Belligerents and Neutrals.

(*a*) *A General View of the Relations between Belligerents and Neutrals.*

172. **Historical Sketch of the Subject.** Bonfils, §§ 1494–1521, 1442; 4 Calvo, §§ 2491–2553; Hall, §§ 208–213; Heffter, § 152; 1 Jones, 398, 2 *Ib.*, 365; Kleen, Lois et usages de la neutralité d'après le droit international conventionel et coutumiers des états civilisés, 1898, 1899; Lawrence, 472–499; Liszt, 329–330; 3 Martens, 315–

325; 3 Phillimore, 300–369; 2 Rivier, 369–379; Taylor, §§ 596–613; D. Wheaton, §§ 412–425, note 215; L. Wheaton, 696 *et seq.*; Woolsey, § 163.

(*b*) *Neutral Duties.*

173. **Neutrals should not permit their Territory to be used for Hostile Purposes by either Belligerent. — Transit of Troops. — Fitting out Hostile Expeditions. — Capture of Vessels in Neutral Waters.** The *Anna*, Cases, 684; The *Twee Gebroeders*, *Ib.*, 687, note; The *Eliza Ann*, *Ib.*, 689, note; The *Anne*, *Ib.*, 688; The *General Armstrong*, *Ib.*, 687, note; Commodore Stewart's Case, *Ib.*, 910; The *Adela*, *Ib.*, 689, note; The *Florida*, *Ib.*, 690; see also The *Perle*, *Ib.*, 688, note, and The *Grange*, *Ib.*, 690, note.
Bluntschli, §§ 749–782; Bonfils, §§ 1449 *et seq.*; 4 Calvo, §§ 2592–2642; Creasy, 570–681; Hall, §§ 214–223; 2 Halleck, 141 *et seq.*; Historicus, 147–162; 1 Jones, 398, 2 *Ib.*, 365; Liszt, 331–332; 3 Martens, 326 *et seq.*; A. P. Morse, Rights of Belligerents and Neutrals from the American Point of View, 37 Am. Law Register (N. S.), 657–687; 1 Phillimore, 223–236; 2 Rivier, 380–406; Rivier, L. B., 440–447; Snow, § 57; Taylor, §§ 617–621; 2 Twiss, 440–459; D. Wheaton, §§ 425–435; L. Wheaton, 713–727; Woolsey, §§ 164 *et seq.*

174. **Equipment of Vessels of War in Neutral Territory.** U. S. v. Guinet, Cases, 695; U. S. v. Peters, *Ib.*, 697; The *Santissima Trinidad*, *Ib.*, 701, and 705 note; U. S. v. Quincy, *Ib.*, 706; U. S. v. The *Meteor*, *Ib.*, 711; The Alabama Claims and Award, *Ib.*, 713. C. F. Adams, The Treaty of Washington (Lee at Appomattox, 31 *et seq.*); Bernard, Neutrality of Great Britain, 360 *et seq.*, 412 *et seq.*; Bluntschli, § 763; Bonfils, §§ 1464 *et seq.*; Bullock, Secret Service of Confederate States in Europe (1884); Calvo, §§ 2553, 2590, 2623; Hall, §§ 223 *et seq.*; 2 Halleck, 153–163; Historicus, 163–171; Lawrence, 535–556; Liszt, 332; 3 Phillimore, 236 *et seq.*; 2 Rivier, 406; Rivier, L. B., 447–449; Snow, § 58; Taylor, §§ 614–617; D. Wheaton, p. 535, note 215; L. Wheaton, 728; Woolsey, § 170.

175. **Loans of Money to Belligerents.** Bluntschli, § 768; Bonfils, § 1471; 4 Calvo, § 2628; Hall, § 216; 2 Halleck, 163; Lawrence, 520; Liszt, 332; 3 Phillimore, 247; Snow, § 59, Taylor, § 622.

176. **Sale of Munitions of War by a Neutral State.** Sale of Arms to France, Cases, 747, note.

Hall, § 217; 1 Jones, 51; Lawrence, 520; Liszt, 333; 2 Rivier, 408–415; Snow, § 59; Taylor, § 624.

177. **Aid to Insurgents. — Loans. — Munitions of War.** Thompson v. Powles, Cases, 37; De Wutz v. Hendricks, *Ib.*, 721; Kennett v. Chambers, *Ib.*, 723; U. S. v. Trumbull, *Ib.*, 731; The *Salvador*, *Ib.*, 743; The *Three Friends*, *Ib.*, 748.
Hall, § 5; Historicus, 41–51; 2 Jones, 51; 3 Phillimore, 247–250; Snow, § 60; D. Wheaton, § 23, note 15.

(*c*) *Contraband of War.*

178. **General Law of Contraband.** Bluntschli, 465 *et seq.*; Bonfils, §§ 15–35 *et seq.*; 5 Calvo, §§ 2708 *et seq.*; Hall, §§ 236 *et seq.*; 2 Halleck, 214 *et seq.*; Historicus, 121–137; Heffter, §§ 158–159; 1 Jones, 108; Lawrence, § 277; Liszt, 334; 3 Martens, 347–355; Payn, State Interference in Contraband trade and Blockade-Running, 24 Law Magazine and Review, 5th ser.. 203–218, 329–341, 448–457; 2 Rivier, § 217; Rivier, L. B., 451; 3 Phillimore, 387 *et seq.*; Snow, § 61; Taylor, §§ 653 *et seq.*; 2 Twiss, 232–298; D. Wheaton, §§ 476 *et seq.*, note 226; L. Wheaton, §§ 767 *et seq.*; Woolsey § 193.

179. **Classification of Contraband. — Res ancipitis usus. — Occasional Contraband.** The *Peterhoff*, Cases, 760; The *Jonge Margaretha*, *Ib.*, 762; The *Commercen*, *Ib.*, 765; Other Cases, *Ib.*, 766, note. Bluntschli, 466; Bonfils, 1538–1565; 5 Calvo, §§ 2708–2754; Creasy, 609 *et seq.*; Hall, §§ 236 *et seq.*; 2 Halleck, 222 *et seq.*; Heffter, § 160; 1 Jones, 108, 2 *Ib.*, 94; Lawrence, §§ 278–279; Liszt, 335; Maxey, Are Food-Stuffs Contraband, 34 Am. Law Review, 205–213; 2 Rivier, § 217; Snow, 136; 3 Phillimore, 403–459; Taylor, §§ 655–663; D. Wheaton, §§ 477–502; L. Wheaton, 769 *et seq.*; Woolsey, §§ 194 *et seq.*

180. **Penalty for Carrying Contraband. — Time when Penalty attaches. — Rule of English and American Courts. — French Rule.** The *Neutralitet*, Cases, 767; Carrington v. Merchants Ins. Co., *Ib.*, 769; The *Imina*, *Ib.*, 776; Seton v. Low, *Ib.*, 778; *Ex parte* Chavasse, *Ib.*, 779, note; see also The *Sarah Christiana*, *Ib.*, 775, note; The *Haabet*, *Ib.*, 776, note.
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more, 460; Taylor, § 666; D. Wheaton, § 505, note 230; L. Wheaton, 806 *et seq.*; Woolsey, § 198.

181. **Despatches and Persons as Contraband.** The *Atalanta*, Cases, 780; The *Madison*, *Ib.*, 785; The *Orozembo*, *Ib.*, 785; The *Rapid*, *Ib.*, 782; The *Trent*, *Ib.*, 788, note; The *Panama*, *Ib.*, 788.
Bernard, 186–225; Bluntschli, 475; Calvo, §§ 2796–2826; Creasy, 627–632; Hall, §§ 248–253; Harris, *Trent* Affair, p. 239; Historicus, 185–198; Liszt, 338; Phillimore, 459; Snow, § 62; Taylor, § 669; D. Wheaton, 502–504, note 228; L. Wheaton, 797 *et seq.*; Woolsey, § 199.

(*d*) *Blockade.*

182. **The Purpose of Blockade. — Must be Effective. — Notification. — De facto Blockade.** The *Neptunus*, Cases, 796; The *Betsey*, *Ib.*, 798; The *Panaghia Rhomba*, *Ib.*, 800, and note, 803; The *Johanna Maria*, *Ib.*, 803; The *Franciska*, *Ib.*, 804; The *Gerasimo*, *Ib.*, 811; The *Nancy*, *Ib.*, 817; The *Ocean*, *Ib.*, 819; The *Olinde Rodrigues*, *Ib.*, 835.
Bernard, 226 *et seq.*, 283; Bluntschli, §§ 827–839; Bonfils, §§ 1079 *et seq.*; 5 Calvo, §§ 2827 *et seq.*, §§ 2909 *et seq.*; Creasy, §§ 597 *et seq.*; Fauchille, Du Blocus Maritime, 1882; Hall, §§ 257 *et seq.*; 2 Halleck, 182 *et seq.*; Heffter, §§ 154 *et seq.*; Historicus, 87–118; 1 Jones, 60, 2 *Ib.*, 46; Lawrence, §§ 269 *et seq.*; Liszt, §§ 320–321; 4 Phillimore, 473 *et seq.*; 2 Rivier, 288 *et seq.*; Rivier, L. B., 409–412; Soley, Blockade and Cruisers; Taylor, §§ 674 *et seq.*; 2 Twiss, §§ 98 *et seq.*; D. Wheaton, §§ 509–523; L. Wheaton, 819 *et seq.*; Woolsey, §§ 202–204.

183. **Penalty for Breach of Blockade. — When does the Penalty attach? — French Rule.** The *Helen*, Cases, 821; The *Adula*, *Ib.*, 826.
5 Calvo, §§ 2897 *et seq.*; Creasy, 620; Hall, § 264; 3 Halleck, 208, *et seq.*; Lawrence, § 275; Liszt, 322; 3 Phillimore, 506; Snow, § 63; Taylor, § 779; 2 Twiss, 100; Walker, 525; Woolsey, § 205.

(*e*) *Rule of the War of* 1756.

184. **Neutrals may not Engage in a Trade during War, from which they were excluded in Time of Peace.** The *Immanuel*, Cases, 845; The *Emanuel*, *Ib.*, 847.
Bluntschli, §§ 799–800; Bonfils, § 1534; Creasy, § 621; Hall,

§ 234; 2 Halleck, 301; 3 Phillimore, 370–379; 2 Rivier, 411; Snow, § 65; 2 Twiss, § 100; D. Wheaton, 508; L. Wheaton, 814; Woolsey, § 200.

(f) Continuous Voyages.

185. **Colonial Trade, and Coasting Trade. — Extension in 1793.** The *William,* Cases, 848.
Bernard, Neutrality, 310; Bonfils, §§ 1666–1667; Hall, 694; 1 Jones, 108; Liszt, 322; 3 Phillimore, 383; 2 Rivier, 432–434; Snow, § 65; Taylor, § 683; Twiss in 3 Law Mag. and Rev. (4th ser.), 1; Walker, 512.

186. **Applied to the Carriage of Contraband, and the Breach of Blockade by the American Courts.** The *Stephen Hart,* Cases, 852; The *Bermuda,* 1865, 6 Wall. 514; The *Springbok,* 1866, 5 Wall. 1; The *Peterhoff,* 1866, Cases, 760; Hobbs v. Henning, 1864 (Bernard, 316, note); L'Affaire du Doelwijk, 1896 (24 Journal de Droit Int. Privé, 268–298).
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(g) Right of Search and Capture.

187. **The Right of Visit and Search is a Belligerent Right, to which Neutrals are subject. Resistance in any Manner to this Right entails Condemnation.** The *Maria,* Cases, 858; The Schooner *Nancy, Ib.,* 861; The Brig *Sea Nymph, Ib.,* 869; The Ship *Rose, Ib.,* 879.
Bluntschli, §§ 819–826; Bonfils, §§ 586–590; 5 Calvo, §§ 2939–2951; Creasy, §§ 636–637; Fauchille, La théorie du voyage continu en matière de contrabande de guerre, 4 R. G. D. I., 297 *et seq.* Hall, §§ 270–272; 2 Halleck, 239 *et seq.*; Heffter, §§ 167–170; Liszt, 200–201; 3 Martens, 355–357; 3 Phillimore, 522–544, 550; 2 Rivier, 423–428; Rivier, L. B., 454–455; Snow, § 66; Taylor, §§ 685 *et seq.*; D. Wheaton, 524–528; Woolsey, §§ 208–209.

188. **Formalities of the Exercise of the Right of Search. — Grounds of Capture. — False Documents. — Spoliation Papers.** 5 Calvo, §§ 2952

et seq.; Hall, §§ 273–277; 2 Halleck, 258, 271; 3 Phillimore, 536; 2 Rivier, 348–352.

189. **The Right of Visit and Search in Time of Peace. — Impressment of Seamen. — Slave Trade. — Protection of Seals. — Piracy.** *Le Louis*, Cases, 352; The *Marianna Flora*, *Ib.*, 873; Behring Sea Award (*La Ninfa*), *Ib.*, 443.
Bluntschli, §§ 343–346; Bonfils, §§ 591–593; 5 Calvo, §§ 2992–3003; 2 Halleck, 240–246, 272; 1 Jones, 264, 569; Liszt, 200; 3 Phillimore, 525–529; Schuyler, Am. Dip., 233–264; D. Wheaton, § 125, note 85, §§ 108–109, note 67; Woolsey, §§ 212–221.

190. **The Right to Capture Enemy's Goods in Neutral Vessels, and Neutral Goods in Enemy's Vessels. — "Free Ships, Free Goods." — Declaration of Paris.** The *Nereide*, Cases, 884; The *Atlas*, *Ib.*, 895; Darby v. The Brig *Erstern*, *Ib.*, 896; Declaration of Paris, *Ib.*, 898, note.
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(*h*) *Prize Courts.*

191. **The Constitution of Prize Courts in Different Countries.** 5 Calvo, §§ 3035 *et seq.*; 2 Halleck, 378–399; Liszt, 326; 3 Phillimore, 658–668; 2 Rivier, 353 *et seq.*; Snow, § 69; Taylor, § 563; L. Wheaton, § 960–976.

192. **The Principles and Practice of Prize Courts.** Miller v. The *Resolution* (1), Cases, 899; Miller v. The *Resolution* (2), *Ib.*, 906, and note, 909; Commodore Stewart's Case, *Ib.*, 910.
5 Calvo, §§ 3066 *et seq.*; 2 Halleck, 412, 421–431; 1 Jones, 447; Liszt, 326–327; 3 Phillimore, 666–679; Taylor, §§ 464–566; D. Wheaton, § 385, note 186.

193. **They are Courts of the Captor's Country. — Effect of their Decisions.** The *Flad Oyen*, Cases, 919; Oddy v. Bovill, *Ib.*, 924, and note, 925; Dalgleish v. Hodgson, *Ib.*, 926; The *Betsey*, 1797 (3 Moore, Int. Arb., 3180–3206); Cushing, Adm'r, v. U. S., Cases, 929.
5 Calvo, §§ 3036 *et seq.*; 2 Halleck 378; Taylor, § 566; 2 Twiss, § 166; D. Wheaton, § 390.

194. **Prize Courts of the Confederacy: On Land and on board Ships.** The *Lilla* (1862), Cases, 62; The *Ike Davis* (1864, reported as no. 1086 in Court of Alabama Claims, 1883); Practice of Captain Semmes, Cases, 932, note.
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ON

INTERNATIONAL LAW.

INTRODUCTION.

Section 1.—International Law is a part of the Municipal Law of States.

HARRIS, J., IN HEIRN v. BRIDAULT AND WIFE, 1859.

(37 *Mississippi*, 209, 229.)

It is only by virtue of the municipal law of each state or nation, or by the law of civilized nations, which is regarded as a part of the municipal law of each, that aliens have any rights at all; and neither the municipal law, nor the law of nations, has any extraterritorial operation. As the municipal law is limited in its operation to the territory of the nation by which it is established, and whose citizens have agreed to be governed by its rules, and does not extend to any other nation or people who have not thus consented to its obligations; so the law of nations, having its origin in the necessities growing out of commercial, social, and diplomatic intercourse of *civilized* nations, and being founded upon the express or implied assent of such nations, cannot be extended to embrace those nations or people who neither respect nor acknowledge the laws of God or man, and are wholly incapable, from their nature and constitution, of *civilized* intercourse. "The law of nations is a system of rules, which reason, morality, and custom have established among *civilized* nations as their public law." 1 Kent, Com. 1; 1 Black. Com. 43.

Mr. Wheaton, in his work on International Law, after examining the definition and sources of international law, as discussed by Grotius, Hobbes, Puffendorf, Rutherforth, Bynkershoek, Hefftter, Vattel, Montesquieu, and others, and the character of its obliga-

tions, and upon what nations it operates, thus defines it: "International law, as understood *among civilized* nations, may be defined as consisting of those rules of conduct which reason deduces as consonant to justice, from the nature of the society, existing among independent nations; with such definitions and modifications as may be established by *general consent*," and for this he cites Mr. Madison. See International Law, 46.

"There is, then," he says in another place, "according to these writers, no universal, immutable law of nations, binding upon the *whole human race*, which mankind, in all ages and countries, ancient and modern, savage and civilized, Christian and Pagan, have recognized in theory or in practice, have professed to obey, or in fact have obeyed. * * * The obligation of the ordinary *jus gentium depends upon the persuasion that other nations will observe the same rules in their intercourse with us, which we observe towards them;* or if they fail to observe these rules, that they will incur the *general hostility of nations. But this persuasion cannot exist, as to those races of men who do not recognize one law of nations.*" Wheaton, International Law, 49; 1 Burlamaqui, 137–8.[1]

[1] In *U. S.* v. *The Active*, 1814, 24 Fed. Cases, 755, Toulman, J., says: "What, indeed, is the law of nations? It is that rule of conduct which regulates the intercourse of nations with one another; or in the words of the author last cited, 'The law of nations is the science of the law subsisting between nations or states, and of the obligations that flow from it.' Vatt. Law Nat. 49. It is a law for the government of national communities as to their mutual relations, and not for the government of individuals of those communities in their relation towards one another — nor can it control the conduct of nations towards their own citizens, except in cases involving the rights of other nations."

Van Ness, J., says (in *Johnson et als.* v. *21 Bales, 28 Cases of Merchandise, etc.*, 2 Paine, 601, 604): "In examining the points which have been stated, it will be necessary to advert to some general principles of the law of nations. In doing this, it will not be requisite to notice particularly its divisions into *necessary, voluntary, conventional or positive*. The law of nations, without defining or developing its divisions more minutely, may be stated to be the law of nature, rendered applicable to political societies, and modified, in process of time, by the tacit or express consent, by the long established usages and written compacts of nations: usages and compacts become so general that every civilized people ought to recognize and adopt their principles."

In considering the application of this law of nations to non-christian communities (the Mahometan states of Africa), Lord Stowell, then Sir William Scott, says: "It is by the law of treaty only that these nations hold themselves bound, conceiving (as some other people have foolishly imagined) that there is no other law of nations but that which is derived from positive compact and conventions (*The Helena*, 1801, 4 C. Rob., 4, 7). In another case, the same eminent authority says: "Independent of such engagements [treaties], it is well known that this court is in the habit of showing something of a peculiar indulgence to persons of that part of the world [Ottoman Porte]. The inhabitants of those countries are not professors of exactly the same law of nations with ourselves. In consideration of the peculiarities of their situation

STORY, J., IN "LA JEUNE EUGENIE," 1822.

(2 *Mason*, 409.)

Now the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states. What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations, which is not universally recognized, as such, by all civilized communities, or even by those constituting, what may be called, the Christian states of Europe. Some doctrines, which we, as well as Great Britain, admit to belong to the law of nations are of but recent origin and application, and have not, as yet, received any public or general sanction in other nations; and yet they are founded in such a just view of the duties and rights of nations, belligerent and neutral, that we have not hesitated to enforce them by the penalty of confiscation. There are other doc-

and character, the court has repeatedly expressed a disposition not to hold them bound to the utmost rigor of that system of public laws on which European states have so long acted in their intercourse with one another" (*The Madonna del Burso*, 1802, 4 C. Rob. 169, 172. (To the same effect, he says in another case: "It has been argued that it would be extremely hard on persons residing in the kingdom of Morocco, if they should be held bound by all the rules of the law of nations, as it is practised amongst European states. On many accounts undoubtedly they are not to be strictly considered on the same footing as European merchants; they may, on some points of the law of nations, be entitled to a very relaxed application of the principles, established by long usage, between the states of Europe holding an intimate and constant intercourse with each other. It is a law made up of a good deal of complex reasoning, though derived from very simple rules, and altogether composing a pretty artificial system, which is not familiar either to their knowledge or their observations. Upon such considerations, the court has, on some occasions, laid it down that the European law of nations is not to be applied in its full rigor to the transactions of persons of the description of the present claimants, and residing in that part of the world (2d Adm. Rep. p. 88). But on a point like this, the breach of a blockade, one of the most universal and simple operations of war in all ages and countries, excepting such as were merely savage, no such indulgence can be shown (*The Hurtige Hane*, 1801, 3 C. Rob. 324, 325, 326). — Ed.

trines, again, which have met the decided hostility of some of the European states, enlightened as well as powerful, such as the right of search, and the rule, that free ships do not make free goods, which, nevertheless, both Great Britain and the United States maintain, and in my judgment with unanswerable arguments, as settled rules in the Law of Prize, and scruple not to apply them to the ships of all other nations.[1] And yet, if the general custom of nations in modern times, or even in the present age, recognized an opposite doctrine, it could not, perhaps, be affirmed, that that practice did not constitute a part, or, at least, a modification of the law of nations.

But I think it may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice, whenever it arises in judgment. And I may go farther and say, that no practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct principle, whenever both nations by their public acts recede from such practice, and admit the injustice or cruelty of it.

AN ACT FOR PRESERVING THE PRIVILEGES OF AMBASSADORS, AND OTHER PUBLIC MINISTERS OF FOREIGN PRINCES AND STATES. 1708.

(1 *Chitty's Statutes, 3d ed.*, 47.)

Whereas several turbulent and disorderly persons having in a most outrageous manner insulted the person of his excellency Andrew Artemonowitz Mattneof, ambassador extraordinary of his czarish majesty, emperor of Great Russia, her majesty's good friend and ally, by arresting him, and taking him, by violence, out of his coach in the public street, and detaining him in custody for several hours, in contempt to the protection granted by her majesty, contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other public ministers, authorized and received as

[1] See the Declaration of Paris, 1856, *infra*. The United States observed the principles of the Declaration in the Civil War, 1861-1865, and the rules of the Declaration were officially adopted and proclaimed by the President, April 26, 1898, at the outbreak of the Spanish-American War (10 Richardson's Messages & Papers, 204). See also Dana's Wheaton, note, 223; Hall's Int. Law, 708-717. — Ed.

such, have at all times been thereby possessed of, and ought to be kept sacred and inviolable; Be it therefore declared, that all actions and suits, writs and processes, commenced, sued, or prosecuted, against the said ambassador by any person or persons whatsoever, and all bail bonds given by the said ambassador, or any other person or persons on his behalf, and all recognizances of bail given or acknowledged in any such action or suit, and all proceedings upon or by pretext or color of such action or suit, writ or process, and all judgments had thereupon, are utterly null and void, and shall be deemed and judged to be utterly null and void, to all intents, constructions, and purposes whatsoever.

2. That all entries, proceedings, and records, against the said ambassador or his bail, shall be vacated and cancelled.

3. And to prevent the like insolences for the future, be it further declared, that all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other public minister of any foreign prince or state authorized and received as such by her majesty, her heirs or successors, or the domestic or domestic servant of any such ambassador or other public minister, may be arrested and imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever.

4. That in case any person or persons shall presume to sue forth or prosecute, any such writ or process, such person and persons, and all attorneys and solicitors prosecuting and soliciting in such case, and all officers executing any such writ or process, being thereof convicted by the confession of the party, or by the oath of one or more credible witness or witnesses, before the lord chancellor or keeper of the great seal of Great Britain, the chief justice of the court of queen's bench, the chief justice of the court of common pleas, for the time being, or any two of them, shall be deemed violators of the laws of nations, and disturbers of the public repose, and shall suffer such pains, penalties, and corporal punishment, as the said lord chancellor, lord keeper, and the said chief justices, or any two of them, shall judge fit to be imposed and inflicted.

5. Provided, that no merchant or other trader, whatsoever, within the description of any of the statutes against bankrupts who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by this act, and that no person shall be proceeded against as having arrested the servant of an ambassador or public minister by virtue of this act, unless the name of such servant be first registered in the office of one of the principal secretaries of state, and by such secretary transmitted by

the sheriffs of London and Middlesex for the time being, or their under sheriffs or deputies, who shall, upon the receipt thereof, hang up the same in some public place in their offices, whereto all persons may resort, and take copies thereof without fee or reward.

6. That this act shall be taken and allowed in all courts within this kingdom as a public act, and that all judges and justices shall take notice of it without special pleading, and all sheriffs, bailiffs, and other officers and ministers of justice concerned in the execution of process are hereby required to have regard to this act, as they will answer the contrary at their peril.[1]

TRIQUET AND OTHERS v. BATH.

PEACH AND ANOTHER v. BATH.

COURT OF KING'S BENCH, 1764.

(3 *Burrow*, 1478.)

Mr. Blackstone, Mr. Thurlow, and Mr. Dunning, on behalf of the plaintiffs, showed cause why the bill of Middlesex in each of these causes should not be set aside, and the bail-bond be cancelled.

The rule was made upon affidavits "Of the defendant's being a domestic servant of a foreign minister; and having taken all the proper steps to entitle him to the privilege of such domestics."

The only question was, "Whether the defendant (Christopher Bath) was really and truly and *bona fide* a domestic servant of Count Haslang, the Bavarian minister;" or, "Whether his service was only colorable, and a mere sham and pretence calculated to protect him from the just demands of his creditors."

Lord MANSFIELD: — This privilege of foreign ministers and their domestic servants depends upon the law of nations. The act of Parliament of 7 Ann. c. 12, is declaratory of it. All that is new in this act, is the clause which gives a summary jurisdiction for the punishment of the infractors of this law.

The act of Parliament was made upon occasion of the Czar's ambassador being arrested. If proper application had been immediately

[1] "Sections 4062, 4063, 4064, and 4065 were originally sections 25, 26, 27, and 28 of the Crimes Act of April 30, 1790, c. 9, 1 Stat. 118; and these were drawn from the statute of Anne, c. 12, which was declaratory simply of the law of nations, which Lord MANSFIELD observed, in *Heathfield* v. *Chilton*, 4 Burrow, 2015, 2016, the Act did not intend to alter, and could not alter." Per FULLER, C. J., in *Re Baiz*, 1889, 135 U. S. 403, 420. — ED.

made for his discharge from the arrest, the matter might and doubtless would have been set right. Instead of that, bail was put in, before any complaint was made. An information was filed by the then attorney-general against the persons who were thus concerned, as infractors of the law of nations, and they were found guilty, but never brought up to judgment.

The Czar took the matter up, highly. No punishment would have been thought by him an adequate reparation. Such a sentence as the court could have given, he might have thought a fresh insult.

Another expedient was fallen upon and agreed to; this act of Parliament passed, as an apology and humiliation from the whole nation. It was sent to the Czar, finely illuminated, by an ambassador extraordinary, who made excuses in a solemn oration.

A great deal relative to this transaction and negotiation appears in the annals of that time; and from a correspondence of the Secretary of State there printed.

But the act was not occasioned by any doubt "Whether the law of nations, particularly the part relative to public ministers, was not part of the law of England, and the infraction, criminal; nor intended to vary an iota from it.

I remember in a case before Lord Talbot, of *Buvot* v. *Barbut*, upon a motion to discharge the defendant (who was in execution for not performing a decree), "Because he was agent of commerce, commissioned by the King of Prussia, and received here as such;" the matter was very elaborately argued at the bar; and a solemn deliberate opinion given by the court. These questions arose and were discussed. — "Whether a minister could, by any act or acts, waive his privilege." — "Whether being a trader was any objection against allowing privilege to a minister, personally." — "Whether an agent of commerce, or even a consul, was entitled to the privileges of a public minister." — "What was the rule of decision: the act of Parliament or the law of nations." Lord Talbot declared a clear opinion — "That the law of nations, in its full extent, was part of the law of England." — "That the act of Parliament was declaratory, and occasioned by a particular incident." — "That the law of nations was to be collected from the practice of different nations, and the authority of writers." Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Binkershoek, Wiquefort, &c.; there being no English writer of eminence upon the subject.

I was counsel in this case, and have a full note of it.

I remember, too, Lord Hardwicke's declaring his opinion to the same effect; and denying that Lord Chief Justice Holt ever had any

doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian ambassador.

Mr. Blackstone's principles are right; but as to the facts in the present case, the affidavits on the part of the defendant have outsworn those on the part of the plaintiffs. (And his Lordship, as well as Mr. Justice Wilmot, took notice that the person who drew the affidavits on the part of the defendant had very exactly pursued the course of the cases that had been determined upon questions of this kind; and had taken care to meet and answer all objections that might arise from them.) Lord Mansfield observed also, that the defendant was employed in the service of Monsieur Hastang, before the plaintiff took out his writ.

It was not to be expected, he said, that every particular act of the service should be particularly specified; it is enough if an actual *bonâ fide* service be proved. And if such a service be sufficiently proved by affidavit, we must not, upon bare suspicion only, suppose it to have been merely colorable and collusive.

As to the latter point, "Of his being a trader" — his having been so in Ireland (and even that seven years ago, too), will not bring him within the exception of the 5th clause of this act, which provides "That no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by that act."

And there is no color for bringing this case within that of *Dodsworth* v. *Anderson;* for here is no connection between the goods bought in England and those sold in Ireland. It does not appear that they were the same goods; neither is any time specified, when they were bought, or when they were sold.

Per Cur. — Both rules were made absolute, but without costs, by reason of the suspicious circumstances of this case.

BLACKSTONE'S COMMENTARIES, BOOK IV. CHAPTER IV., 1765.

The law of nations is a system of rules, deducible by natural reason and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states and the individuals belonging to each.

This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.

In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world. Thus in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.

But, though in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent, as adopted by the law of England; yet the present branch of our inquiries will fall within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations; in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any

state violate this general law, it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained.

For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion and involve the two states in a war. It is therefore incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

ARTICLES OF CONFEDERATION, 1777 (1781–1788)

ARTICLE IX.

The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding in all cases what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures; provided that no member of Congress shall be appointed as judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever.[1] * * *

[1] On Articles of Confederation, see generally Fiske's "Critical Period of American History," pp. 92–102; Frothingham's "Rise of the Republic," pp. 561–572. For the judiciary contemplated by the Articles, see a valuable essay entitled "The Predecessor of the Supreme Court," by Professor Jameson in "Essays in the Constitutional History of the United States" (1889). "It is obviously impossible," he says, at page 34 of the essay referred to, "to discuss here the various cases decided by the court, though

THE CONSTITUTION OF THE UNITED STATES, 1789.

Art. I., Sect. 8. The Congress shall have power * * * To regulate commerce with foreign nations, and among the several States and with the Indian tribes;

To establish an uniform rule of naturalization * * *;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

Section 10. No State shall enter into any treaty alliance, or confederation; grant letters of marque or reprisal. * * *

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Art. II., Sect. 2. He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls. * * *

Sect. 3. * * * He shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed and shall commission all the offices of the United States.

Art. III., Sect. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *

two of them were afterward important as cases in the Supreme Court of the United States, — the cases of *Penhallow* v. *Doane*, 3 Dallas, 54, and *Jennings* v. *Carson*, 4 Cranch, 2, the former of which, in 1795, settled the jurisdiction of the Court of Appeals. Judge Davis computes that 'sixty-five cases in all were submitted to the Committees of Congress, of which forty-nine were decided by them, four seem to have disappeared, and twelve went over to the Court of Appeals for decision;' and that 'fifty-seven cases in all, including the twelve which went over, were submitted to the Court of Appeals, and all were disposed of.' Eight more of its cases are reported in 2 Dallas (1–42), making one hundred and eighteen in all." Some of these cases are printed *infra*. See also Hon. J. C. Bancroft Davis' monograph entitled "The Committees of the Continental Congress chosen to hear and determine Appeals from Courts of Admiralty and the Court of Appeals in Cases of Capture, established by that Body" (131 U. S., Appendix XII.–LXIII.). This matter of the judiciary under the Articles of Confederation is briefly but admirably treated in Chapter III. (pp. 39–64) of Hampton L. Carsons' authoritative "Supreme Court of the United States, its History" (1891). — Ed.

Sect. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction [1] to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Courts shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Sect. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession

[1] Maritime law (unless part of international law) has the effect of law only in so far as it is adopted by the laws, usages, and customs of the particular country, *Norwich Co.* v. *Wright*, 1872, 13 Wall. 104; especially *The Lottawanna*, 1874, 21 Wall. 558, 572–578, where the subject is discussed in detail; *The Scotland*, 1881, 105 U. S. 24, where cases in 13 & 21 Wallace are cited and approved.

In *The Manhasset*, 1884, 18 Fed. R. 918, 920–923, this subject was considered and the following résumé is found on p. 922 of the judgment of Hughes, J.: "From all that has been said, these things would seem to be clear: *First*, that maritime law, existing as it does by the common consent of nations, and being a general law, cannot be changed or modified as to its general operation by any particular sovereignty; *second*, that it has force in any country only by its adoption, express or implied, by that country, and may be modified in its special operation in that jurisdiction at the will of the special sovereignty; *third*, that it is by such adoption part of the Federal law of the United States, and incapable of modification by state enactment, — Congress having exclusive power, under the constitution, 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes;' and the judicial power of the United States, 'exclusive of the State courts,' extending 'to all cases of admiralty and maritime jurisdiction.'"

The leading cases on mercantile and maritime law are collected and annotated in Tudor's Mercantile Cases (3d ed., 1884). For the origin, nature, and extent of admiralty jurisdiction in the United States, see Ames: Cases on Admiralty (1901). — Ed.

in open court. The Congress shall have power to declare the punishment of treason. * * *

Art. VI. * * * This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. * * *

UNITED STATES v. SMITH.

SUPREME COURT OF THE UNITED STATES, 1820.

(5 *Wheaton*, 153.)

This was an indictment for piracy against the prisoner Thomas Smith, before the circuit court of Virginia, under the act of Congress, of the 3d of March, 1819, c. 76, which provides (s. 5) "That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, *as defined by the law of nations*, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death."

The jury found a special verdict as follows: "We of the jury find, that the prisoner, Thomas Smith, in the month of March, 1819, and others, were part of the crew of a private armed vessel, called the *Creollo* (commissioned by the government of Buenos Ayres, a colony then at war with Spain), and lying in the port of Margaritta; that in the month of March, 1819, the said prisoner and others of the crew mutinied, confined their officers, left the vessel, and in the said port of Margaritta seized by violence a vessel called the *Irresistible*, a private armed vessel, lying in that port, commissioned by the government of Artegas, who was also at war with Spain; that the said prisoner and others, having so possessed themselves of the said vessel, the *Irresistible*, appointed their officers, proceeded to sea on a cruise, without any documents or commission whatever; and while on that cruise, in the month of April, 1819, on the high seas, committed the offence charged in the indictment, by the plunder and robbery of the Spanish vessel therein mentioned. If the plunder and robbery aforesaid be piracy under the act of the Congress of the United States, entitled, 'An act to protect the commerce of the United States, and

punish the crime of piracy,' then we find the said prisoner guilty; if the plunder and robbery, above stated, be not piracy under the said act of Congress, then we find him not guilty."

The circuit court divided on the question, whether this be piracy as defined by the law of nations, so as to be punishable under the act of Congress, of the 3d of March, 1819, and thereupon the question was certified to this court for its decision.

Mr. Justice Story delivered the opinion of the court: — "The act of Congress upon which this indictment is founded provides, that if any person or persons whatsoever shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in the United States, every such offender or offenders shall, upon conviction thereof, etc., be punished with death.

"The first point made at the bar is, whether this enactment be a constitutional exercise of the authority delegated to Congress upon the subject of piracies. The Constitution declares, that Congress shall have power 'to define and punish piracies and felonies, committed on the high seas, and offences against the law of nations.' The argument which has been urged in behalf of the prisoner is, that Congress is bound to define, in terms, the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by the counsel that it equally applies to the 8th section of the act of Congress of 1790, ch. 9, which declares, that robbery and murder committed on the high seas shall be deemed piracy; and yet, notwithstanding a series of contested adjudications on this section, no doubt has hitherto been breathed of its conformity to the Constitution.

"In our judgment, the construction contended for proceeds upon too narrow a view of the language of the Constitution. The power given to Congress is not merely 'to define and punish piracies;' if it were, the words 'to define' would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime. And it has been very justly observed, in a celebrated commentary, that the definition of piracies might have been left without inconvenience to the law of nations, though a legislative definition of them is to be found in most municipal codes. But the power is also 'given to define and punish felonies on the high seas, and offences against the law of nations.' The term 'felonies' has been supposed in the same work not to have a very exact and determinate meaning in relation to offences at the common law committed within the body of a country. However this may be, in relation to offences on the high seas, it is necessarily

somewhat indeterminate, since the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law. Offences, too, against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. In respect, therefore, as well as to felonies on the high seas as to offences against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.

"But, supposing Congress were bound in all the cases included in the clause under consideration to define the offence, still there is nothing which restricts it to a mere logical enumeration in detail of all the facts constituting the offence. Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term. That is certain which is by necessary reference made certain. When the act of 1790 declares, that any person who shall commit the crime of robbery, or murder on the high seas, shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act. In respect to murder, where 'malice aforethought' is of the essence of the offence, even if the common-law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of 'malice aforethought' would remain to be gathered from the common law. There would then be no end to our difficulties, or our definitions, for each would involve some terms which might still require some new explanation. Such a construction of the Constitution is, therefore, wholly inadvisable. To define piracies, in the sense of the Constitution, is merely to enumerate the crimes which shall constitute piracy,' and this may be done, either by a reference to crimes having a technical name and determinate extent, or by enumerating the acts in detail, upon which the punishment is inflicted.

"It is next to be considered, whether the crime of piracy is defined by the law of nations with reasonable certainty. What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law. There is scarcely a writer on the law of nations who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions in other

respects, all writers concur in holding that robbery, or forcible depredations upon the sea *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law in terms that admit of no reasonable doubt.

"The common law, too, recognizes and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations (which is part of the common law), as an offence against the universal law of society, a pirate being deemed an enemy of the human race. Indeed, until the statute of 28th of Henry VIII., ch. 15, piracy was punished in England only in the admiralty as a civil-law offence; and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offence. Sir Charles Hedges, in his charge at the admiralty sessions, in the case of *Rex* v. *Dawson*, 5 State Trials, declared in emphatic terms that 'piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty.' Sir Leoline Jenkins, too, on a like occasion, declared that 'a robbery, when committed upon the sea, is what we call piracy;' and he cited the civil-law writers, in proof.

"And it is manifest from the language of Sir William Blackstone, 4 Bl. Comm. 73, in his comments on piracy, that he considered the common-law definition as distinguishable in no essential respect from that of the law of nations. So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. We have, therefore, no hesitation in declaring that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the act of 1819.

"Another point has been made in this case, which is, that the special verdict does not contain sufficient facts upon which the court can pronounce that the prisoner is guilty of piracy. We are of a different opinion. The special verdict finds that the prisoner is guilty of the plunder and robbery charged in the indictment; and finds certain additional facts from which it is most manifest that he and his associates were, at the time of committing the offence, freebooters upon the sea, not under the acknowledged authority, or deriving protection from the flag or commission of any government. If, under such circumstances,

the offence be not piracy, it is difficult to conceive any which would more completely fit the definition.

"It is to be certified to the circuit court that upon the facts stated the case is piracy, as defined by the law of nations, so as to be punishable under the act of Congress of the 3d of March, 1819."

Mr. Justice LIVINGSTONE dissented,

On the ground that the act of Congress did not contain such a definition of piracy as the constitution requires.[1]

THE SCOTIA.

SUPREME COURT OF THE UNITED STATES, 1871.

(14 *Wallace*, 170.)

Mr. Justice STRONG delivered the opinion of the court.[2]

It must be conceded, however, that the rights and merits of a case may be governed by a different law from that which controls a court in which a remedy may be sought. The question still remains, what was the law of the place where the collision occurred, and at the time when it occurred. Conceding that it was not the law of the United States, nor that of Great Britain, nor the concurrent regulations of the two governments, but that it was the law of the sea, was it the ancient maritime law, that which existed before the commercial nations of the world adopted the regulations of 1863 and 1864, or the law changed after those regulations were adopted? Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the

[1] In speaking of this case Sir Robert Phillimore (1 Int. Law, 489, note d) says: "The note (a) to this page [163] contains a most learned and careful accumulation of all the authorities on the subject of Piracy." Lack of space unfortunately compels its omission. — ED.

[2] The facts of the case are omitted, and only that part of the opinion concerning the question of international law is given. — ED.

positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalphitan table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of Jan. 9, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libellants complain took place.

This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but is recognition of the historical fact that, by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.

The consequences of this ruling are decisive of the case before us. The violation of maritime law by the *Berkshire* in carrying a white light (to say nothing of her neglect to carry colored lights), and her carrying it on deck instead of at her masthead, were false representations to the *Scotia*. They proclaimed that the *Berkshire* was a steamer, and such she was manifestly taken to be. The movements of the *Scotia* were therefore entirely proper, and she was without fault.

Decree affirmed, with costs.

THE "PAQUETTE HABANA." THE "LOLA."

SUPREME COURT OF THE UNITED STATES, 1899.

(175 *United States*, 677.)

During the Spanish-American war two small Spanish fishing smacks, the *Paquette Habana* and the *Lola* were respectively captured at sea by the gunboat *Castine* and the steamship *Dolphin*, and taken by their captors into Key West, Fla., where they were libelled and condemned as enemy's property, and sold under decree of the court. On appeal to the Supreme Court of the United States, the question before the court was, are fishing smacks, in the absence of municipal law or treaty, protected from capture by the law of nations, and is such law of nations part of the municipal law of the United States?[1]

Mr. Justice GRAY delivered the opinion of the court.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who, by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton* v. *Guyot*, 159 U. S. 113, 163, 164, 214, 215.[2]

Wheaton places, among the principal sources of international law, "text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent." As to these he forcibly observes: "Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down

[1] This brief statement is substituted for that of the report and only part of the opinion of the court is given.— ED.

[2] Compare the language of Lord COLERIDGE, C. J., in *The Queen* v. *Keyn*, *infra*. — ED.

in their works being impugned by the avowal of contrary principles." Wheaton's International Law (8th ed.), § 15.

Chancellor Kent says: "In the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law." 1 Kent Com. 18.

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast-fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish, which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

Calvo, in a passage already quoted, distinctly affirms that the exemption of coast-fishing vessels from capture is perfectly justiciable, or, in other words, of judicial jurisdiction or cognizance. Calvo, § 2368. Nor are judicial precedents wanting in support of the view that this exemption, or a somewhat analogous one, should be recognized and declared by a prize court.

By the practice of all civilized nations, vessels employed only for the purposes of discovery or science are considered as exempt from the contingencies of war, and therefore not subject to capture. It

has been usual for the government sending out such an expedition to give notice to other powers; but it is not essential. 1 Kent Com. 91, note; Halleck, c. 20, § 22; Calvo, § 2376; Hall, § 138.

In 1813, while the United States were at war with England, an American vessel, on her voyage from Italy to the United States, was captured by an English ship, and brought into Halifax in Nova Scotia, and with her cargo condemned as lawful prize by the Court of Vice-Admiralty there. But a petition for the restitution of a case of paintings and engravings which had been presented to and were owned by the Academy of Arts in Philadelphia, was granted by Dr. Croke, the judge of that court, who said: "The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted, amongst all civilized nations, as forming an exception to the severe rights of welfare, and as entitled to favor and protection. They are considered not as the *peculium* of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species." And he added that there had been "innumerable cases of the mutual exercise of this courtesy between nations in former wars." The Marquis de Somerueles, Stewart Adm. (Nova Scotia), 445, 482.

In 1861, during the war of the rebellion, a similar decision was made, in the District Court of the United States for the Eastern District of Pennsylvania, in regard to two cases of books belonging and consigned to a university in North Carolina. Judge Cadwalader, in ordering these books to be liberated from the custody of the marshal, and restored to the agent of the university, said: "Though this claimant, as the resident of a hostile district, would not be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question gives to it a different character. The United States, in prosecuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory." He then referred to the decision in Nova Scotia, and to the French decisions upon cases of fishing vessels, as precedents for the decree which he was about to pronounce; and he added that, without any such precedents, he should have had no difficulty in liberating these books. *The Amelia*, 4 Philadelphia, 417.[1]

[1] Dissenting opinion of Fuller, C. J., in which Harlan and McKenna, JJ., concurred, is omitted. The opinion of the late Mr. Justice Gray contains an elaborate examination of the authorities, both precedents and text-books, and should be read in full.

In the case of the *Charming Betsy*, 1804, 2 Cranch, 64, 118, Marshall, C. J., said: "It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce further than is warranted by the law of nations as understood in this country."

In the case of the *Nereide*, 1815, 9 Cranch, 388, 423, the same judge said: "Till such an act [of Congress] be passed, the court is bound by the law of nations, which is a part of the law of the land." See also *Talbot* v. *Seeman*, 1801, 1 Cranch, 1, 43.

In the case of *Bentzon* v. *Boyle*, 1815, 9 Cranch, 191, 198, Marshall, C. J., said: "The law of nations is the great source from which we derive those rules respecting belligerent and neutral rights which are recognized by all civilized states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon the law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this."

Bishop says ("Criminal Law," 7th ed. 60): "Doubtless if the legislature, by words admitting of no interpretation, commands a court to violate the law of nations, the judges have no alternative but to obey. Yet no statutes have ever been framed in form thus conclusive; and if a case is *prima facie* within the legislative words, still a court will not take the jurisdiction should the law of nations forbid." Again (p. 69): "All statutes are to be construed in connection with one another, with the common law, with the constitution, and with the law of nations."

On international law as interpreted and enforced in law courts, see the admirable address of Hon. Simeon E. Baldwin before the meeting of the International Law Association at Rouen, 1900, on "The Part taken by Courts of Justice in the Development of International Law." — Ed.

PART I.

INTERNATIONAL RELATIONS IN TIME OF PEACE.

CHAPTER I.

STATES — TERRITORIAL RIGHTS.

Section 2. — (*a*) Definition and Character of Sovereign States.

YRISARRI v. CLEMENT.

Common Pleas, 1825.

(2 *Carrington & Payne*,[1] *Nisi Prius*, 223.)

[In an action brought by the plaintiff against defendant for a libel published in the "Morning Chronicle," it appeared that the plaintiff had been appointed minister and diplomatic agent to Great Britain; that he employed Messrs. Hullett and Widder to raise a loan of £100,000 for the service of Chili; that the "Morning Chronicle" imputed fraud to plaintiff in the application of the money raised by him.]

Best, C. J. — It occurs to me at present, that there is this distinction. If a foreign state is recognized by this country, it is not necessary to prove that it is an existing state; but if it is not so recognized, such proof becomes necessary. There are hundreds in India, and elsewhere, that are existing states, though they are not recognized. I take the rule to be this — if a body of persons assemble together to protect themselves, and support their own independence, and

[1] Only so much of the opinion is given as relates to Chili as a "foreign state." On leave given the court "thought that the opinion of the Chief Justice which he gave at the trial was correct. But they decided on another ground, viz. the incorrectness of some material innuendoes, which was not adverted to at *Nisi Prius*, and therefore made the rule absolute for a new trial" (2 Car. & P. 229). — Ed.

make laws, and have courts of justice, that is evidence of their being a state. We have had, certainly, some evidence here to-day that these provinces formerly belonged to Spain; but it would be a strong thing to say, that because they once belonged, therefore they must always belong. We have recognized lately some of these states. It makes no difference whether they formerly belonged to Spain, if they do not continue to acknowledge it, and are in possession of a force sufficient to support themselves in opposition to it. This is my present opinion; but I will give my brother Taddy leave to move the court upon the subject.

THE REPUBLIC OF HONDURAS, APPELLANT, v. MARCO AURELIO SOTO, RESPONDENT.

COURT OF APPEALS, 1889.

(112 *New York*, 310.)

RUGER, Ch. J. Section 3268 of the Code of Civil Procedure provides that a defendant, in an action brought in a court of record, may require security for costs, in cases, among others, where the plaintiff was, when the action was commenced, either "a person residing without the state;" or "a foreign corporation." The plaintiff claims to be a foreign independent state.

It is urged by the plaintiff that it is neither a person nor a foreign corporation, within the meaning of the Code. It is not disputed but that the plaintiff is an independent government, recognized as such by the United States, and capable of entering into contracts and acquiring property, as well as competent, through the rule of comity, of bringing and maintaining actions in the courts of this country; but it is claimed that it does not come within the description of legal entities authorized to require security for costs. That it is within the spirit of the enactment, we think cannot be disputed, and we are also of the opinion that it is within the letter as well.

Vattel defines "nations or states to be bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint effort of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person, who possesses an understanding and a will peculiar to himself, and is susceptible of obligations and rights." (Law of Nations, 1; Wheaton's International Law, chap. 2, §§ 1, 2; Bouvier's Institutes, title, "Nation.")

That such a being constitutes a legal entity, capable of acquiring and enjoying property and protecting itself from injuries thereto in the courts of foreign countries, has long been recognized and established in the tribunals of civilized nations. (*Republic of Mexico* v. *De Arrangoiz*, 5 Duer, 636; *Hullet* v. *King of Spain*, 1 Dow. & C. 169; *Cherokee Nation* v. *Georgia*, 5 Peters, 52.)

There can be no doubt but that under title 2, chapter 10, part 3, of the Revised Statutes, providing for security for costs in an action brought by any plaintiff, not residing within the jurisdiction of the court, that foreign states and nations were required to give such security, and we do not think that the provisions of the Code were intended to change the law in that respect.

Section 3268 of the Code is stated to be a re-enactment of the previous statute, and it cannot, we think, have been intended thereby to take away the right which resident defendants had to require security for costs. No reason is seen for such a change, and we do not think any was intended to be made. The word "person" was, we think, used in its enlarged sense, as comprising all legal entities except foreign corporations, which were authorized to bring actions in this state. In that sense it embraces moral persons having legal rights, capable of entering into contracts and incurring obligations, as well as natural persons. The statute must be construed with reference to the objects it had in view, the evils intended to be remedied and the benefits expected to be derived from it; and, as thus construed, we can see no reason why the plaintiff is not included within the description of persons intended to be subjected to its obligations.[1]

TEXAS v. WHITE, 1868.

(7 *Wall.* 700, 720-721, 725-726.)

Chase, C. J. Some not unimportant aid, however, in ascertaining the true sense of the Constitution may be derived from considering what is the correct idea of a State, apart from any union or confederation with other States. The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed.

[1] Facts and part of opinion omitted. — Ed.

It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.

This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established. It was stated very clearly by an eminent judge,[1] in one of the earliest cases adjudicated by this court, and we are not aware of anything, in any subsequent decision, of a different tenor.

In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.

The use of the word in this sense hardly requires further remark. In the clauses which impose prohibitions upon the States in respect to the making of treaties, emitting of bills of credit, and laying duties of tonnage, and which guarantee to the States representation in the House of Representatives and in the Senate, are found some instances of this use in the Constitution. Others will occur to every mind.

But it is also used in its geographical sense, as in the clauses which require that a representative in Congress shall be an inhabitant of the State in which he shall be chosen, and that the trial of crimes shall be held within the State where committed.

And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.

In this latter sense the word seems to be used in the clause which

[1] Mr. Justice IREDELL in *Penhallow* v. *Doane's Admrs.*, 3 Dallas, 93.

provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

In this clause a plain distinction is made between a State and the government of a State.

Having thus ascertained the senses in which the word state is employed in the Constitution, we will proceed to consider the proper application of what has been said. * * *

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States." [1] Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.[2]

[1] *County of Lane* v. *The State of Oregon*, 1868, 7 Wall. 71, 76. — Ed.

[2] Equality is the necessary consequence of independence and sovereignty, in speaking of which, Chief Justice Marshall says: "In this commerce [slave trade] thus sanctioned by universal assent, every nation had an equal right to engage. How is

KEITH v. CLARK.

Supreme Court of the United States, 1878.

(97 *United States*, 454.)

[The State of Tennessee organized the Bank of Tennessee in 1838, and agreed by a clause in the Charter to receive all its issues of circulating notes in payment of taxes. A constitutional amendment adopted in 1865 declared the issues of the bank during the insurrectionary period void and forbade their receipt for taxes. The plaintiff tendered forty dollars in bankbills issued during the insurrectionary period but defendants refused to receive them in payment of taxes. The plaintiff thereupon paid under protest forty dollars in lawful money, to recover which sum he brought suit. From judgment of the Supreme Court of Tennessee in favor of the defendant, the suit was brought by writ of error before the Supreme Court of the United States.]

Mr. Justice Miller delivered the opinion of the court.[1] * * *

In entering upon this inquiry we start with the proposition, that unless there is something in the relation of the State of Tennessee and the bank, after the date mentioned, to the government of the United States, or something in the circumstances under which the notes now sued on were issued, that will repel the presumption of a contract under the twelfth section, or will take the contract out of the operation of the protecting clause of the Federal Constitution; this court has established already that there was a valid contract to receive them for taxes, and that the law which forbade this to be done is unconstitutional and void.

Those who assert the exception of these notes from the general

his right to be lost? Each may renounce it for its own people; but can this renunciation affect others?

"No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be devested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it" (*The Antelope*, 1825, 10 Wheat. 66, 122). — Ed.

[1] Part of the opinion relating to the question of jurisdiction is omitted. — Ed.

proposition are not very well agreed as to the reasons on which it shall rest, and we must confess that, as they are presented to us, they are somewhat vague and shadowy. They may all, however, as far as we understand them, be classed under three principal heads.

1. The first is to us an entirely new proposition, urged with much earnestness by the counsel who argued the case orally for the defendant.

It is, in substance, that what was called the State of Tennessee prior to the 6th of May, 1861, became, by the ordinance of secession passed on that day, subdivided into two distinct political entities, each of which was a State of Tennessee. One of them was loyal to the Federal government, the other was engaged in rebellion against it. One State was composed of the minority who did not favor secession, the other of the majority who did. That these two States of Tennessee engaged in a public war against each other, to which all the legal relations, rights, and obligations of a public war attached. That the government of the United States was the ally of the loyal State of Tennessee, and the confederated rebel States were the allies of the disloyal State of Tennessee. That the loyal State of Tennessee, with the aid of her ally, conquered and subjugated the disloyal State of Tennessee, and by right of conquest imposed upon the latter such measure of punishment and such system of law as it chose, and that by the law of conquest it had the right to do this. That one of the laws so imposed by the conquering State of Tennessee on the conquered State of Tennessee was this one, declaring that the issues of the bank during the temporary control of affairs by the rebellious State was to be held void; and that, as conqueror and by right of conquest, the loyal State had power to enact this as a valid law.

It is a sufficient answer to this fanciful theory that the division of the State into two States never had any actual existence; that, as we shall show hereafter, there has never been but one political society in existence as an organized State of Tennessee, from the day of its admission to the Union in 1796 to the present time. That it is a mere chimera to assert that one State of Tennessee conquered by force of arms another State of Tennessee, and imposed laws upon it; and, finally, that the logical legerdemain by which the State goes into rebellion, and makes, while thus situated, contracts for the support of the government in its ordinary and usual functions, which are necessary to the existence of social life, and then, by reason of being conquered, repudiates these contracts, is as hard to understand as similar physical performances on the stage.

2. The second proposition is a modification of this, and deserves more serious attention. It is, as we understand it, that each of the eleven States who passed ordinances of secession and joined the so-

called Confederate States so far succeeded in their attempt to separate themselves from the Federal government, that during the period in which the rebellion maintained its organization those States were in fact no longer a part of the Union, or, if so, the individual States, by reason of their rebellious attitude, were mere usurping powers, all of whose acts of legislation or administration are void, except as they are ratified by positive laws enacted since the restoration, or are recognized as valid on the principles of comity or sufferance.

We cannot agree to this doctrine. It is opposed by the inherent powers which attach to every organized political society possessed of the right of self-government; it is opposed to the recognized principles of public international law; and it is opposed to the well-considered decisions of this court.

"Nations or States," says Vattel, "are bodies politic, societies of men united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights." Law of Nations, sect. 1.

Cicero and subsequent public jurists define a State to be a body political or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength. Wheaton, International Law, sect. 17. Such a body or society, when once organized as a State by an established government, must remain so until it is destroyed. This may be done by disintegration of its parts, by its absorption into and identification with some other State or nation, or by the absolute and total dissolution of the ties which bind the society together. We know of no other way in which it can cease to be a State. No change of its internal polity, no modification of its organization or system of government, nor any change in its external relations short of entire absorption in another State, can deprive it of existence or destroy its identity. Id., sect. 22.

Let us illustrate this by two remarkable periods in the history of England and France.

After the revolution in England, which dethroned and decapitated Charles I., and installed Cromwell as supreme, whom his successors called a usurper; after the name of the government was changed from the Kingdom of England to the Commonwealth of England; and when, after all this, the son of the beheaded monarch came to his own, treaties made in the interregnum were held valid, — the judgments of the courts were respected, and the obligations assumed by the government were never disputed.

So of France. Her bloody revolution which came near dissolving the bonds of society itself, her revolutionary directory, her consul, her Emperor Napoleon, and all their official acts, have been recognized by the nation, by the other nations of Europe, and by the legitimate monarchy when restored, as the acts of France, and binding on her people.

The political society which in 1796 became a State of the Union, by the name of the State of Tennessee, is the same which is now represented as one of those States in the Congress of the United States. Not only is it the same body politic now, but it has always been the same. There has been perpetual succession and perpetual identity. There has from that time always been a State of Tennessee, and the same State of Tennessee. Its executive, its legislative, its judicial departments have continued without interruption and in regular order. It has changed, modified, and reconstructed its organic law, or State Constitution, more than once. It has done this before the rebellion, during the rebellion, and since the rebellion. And it was always done by the collective authority and in the name of the same body of people constituting the political society known as the State of Tennessee.

This political body has not only been all this time a State, and the same State, but it has always been one of the United States, — a State of the Union. Under the Constitution of the United States, by virtue of which Tennessee was born into the family of States, she had no lawful power to depart from that Union. The effort which she made to do so, if it had been successful, would have been so in spite of the Constitution, by reason of that force which in many other instances establishes for itself a status, which must be recognized as a fact, without reference to any question of right, and which in this case would have been, to the extent of its success, a destruction of that Constitution. Failing to do this, the State remained a State of the Union. She never escaped the obligations of that Constitution, though for a while she may have evaded their enforcement.

In *Texas* v. *White* (7 Wall. 700), the first and important question was, whether Texas was then one of the United States, and as such capable of sustaining an original suit in this court by reason of her being such State. And this was at a time when Congress had not permitted her, after the rebellion, to have representatives in either house of that body.

Mr. Chief Justice Chase, in delivering the judgment of the court on this question, says: "The ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The

obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens, of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation. Our conclusion, therefore, is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred."

In *White* v. *Hart* (13 id. 646), Mr. Justice Swayne, after a full consideration of the subject, states the result in this forcible language: "At no time were the rebellious States out of the pale of the Union. * * * Their constitutional duties and obligations were unaffected, and remained the same." And he shows by reference to the formula used in the several reconstruction acts, as compared with those for the original admission of new States into the Union, that in regard to the States in rebellion there was a simple recognition of their restored right to representation in Congress, and no readmission into the Union.

These cases, and especially that of *Texas* v. *White*, have been repeatedly cited in this court with approval, and the doctrine they assert must be considered as established in this forum at least.

If the State of Tennessee has through all these transactions been the same State, and has been also a State of the Union, and subject to the obligations of the Constitution of the Union, it would seem to follow that the contract which she made in 1838 to take for her taxes all the issues of the bank of her own creation, and of which she was sole stockholder and owner, was a contract which bound her during the rebellion and which the Constitution protected then and now, as well as before. Mr. Wheaton says: "As to public debts, — whether due to or from the State, — a mere change in the form of the government, or in the person of the ruler. does not affect their obligation. The essential power of the State, that which constitutes it an independent community, remains the same: its accidental form only is changed. The debts being contracted in the name of the State, by its authorized agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal constitution. The new government succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations, of the former government." International Law, sect. 30. And the citations which he gives from Grotius and Puffendorf sustain him fully.

We are gratified to know that the Supreme Court of the State of Tennessee has twice affirmed the principles just laid down in reference

to the class of bank-notes now in question. In a suit brought by the State of Tennessee against this very bank of Tennessee, to wind up its affairs and distribute its assets, that court, in April, 1875, decreed, among other things, "that the acts by which it was attempted to declare the State independent, and to dissolve her connection with the Union, had no effect in changing the character of the bank, but that it had the same powers, after as before those acts, to carry on a legitimate business, and that the receiving of deposits was a part of such legitimate business." "That the notes of the bank issued since May 6, 1861, held by Atchison and Duncan, and set out in their answer, are legal and subsisting debts of the bank, entitled to payment at their face value, and to the same priority of payment out of the assets of the bank as the notes issued before May 6, 1861."

At a further hearing of the same case, in January, 1877, that court reaffirmed the same doctrine, and also held that the notes were not subject to the Statute of Limitations, and were not bound by it. *State of Tennessee* v. *The Bank of Tennessee*, not reported. This decision was in direct conflict with schedule 6 of the constitutional amendment of 1865, which declared all issues of the bank after May 6, 1861, void, and it necessarily held that the schedule was itself void as a violation of the Federal Constitution.

3. The third proposition on which the judgment of the courts of Tennessee is supported is, that the notes on which the action is brought were issued in aid of the rebellion, to support the insurrection against the lawful authority of the United States, and are therefore void for all purposes.

The principle stated in this proposition, if the facts of the case come within it, is one which has repeatedly been discussed by this court. The decisions establish the doctrine that no promise or contract, the consideration of which was something done or to be done by the promisee, the purpose of which was to aid the war of the rebellion or give aid and comfort to the enemies of the United States in the prosecution of that war, is a valid promise or contract, by reason of the turpitude of its consideration.

In *Texas* v. *White* (*supra*), the suit was for the recovery of certain bonds of the United States which, previously to the war, had been issued and delivered to the State of Texas. During the rebellion the legislature of that State had placed these bonds in the hands of a military commission, and they were delivered by that committee to White and Childs, to pay for supplies to aid the military operations against the government. This court held that while the State was still a State of the Union, and her acts of ordinary legislation were valid, it was otherwise in regard to this transaction. As this is the

earliest assertion of the doctrine in this court, and this branch of the opinion received the assent of all the members of the court but one, and has been repeatedly cited since with approval, we reproduce a single sentence from it: "It may be said," says the court, "perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, personal and real, and providing remedies for injuries to person and estate, and other similar acts which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid."

In *Hanauer* v. *Doane* (12 Wall. 342), it was held that duebills, given in purchase of supplies by a purchasing agent of the Confederate States, were void, though in the hands of a third party; and in support of the judgment Mr. Justice Bradley said: "We have already decided, in the case of *Texas* v. *White*, that a contract made in aid of the late rebellion, or in furtherance and support thereof, is void. The same doctrine is laid down in most of the circuits, and in many of the State courts, and must be regarded as the settled law of the land."

The latest expression of the court on the subject was by Mr. Justice Field, without dissent, in *Williams* v. *Bruffy* (96 U. S. 176), in which the whole doctrine is thus tersely stated: "While thus holding that there was no validity in any legislation of the Confederate States which this court can recognize, it is proper to observe, that the legislation of these States stands on very different grounds. The same general form of government, the same general laws for the administration of justice and the protection of private rights, which had existed in the State prior to the rebellion, remained during its continuance and afterwards. As far as the acts of the States did not impair, or tend to impair, the supremacy of the national authority, or the just rights of the citizens under the Constitution, they are, in general, to be treated as valid and binding." See *Horn* v. *Lockhart et al.*, 17 Wall. 570; *Sprott* v. *United States*, 20 id. 459.

There is, however, in the case before us nothing to warrant the conclusion that these notes were issued for the purpose of aiding the rebellion, or in violation of the laws or the Constitution of the United States. There is no plea of that kind in the record. No such question was submitted to the jury which tried the case. The sole matter stated in defence, either by facts found in the bill of exceptions, or in

the decree of the court, is that the bills were issued after May 6, 1861, while the State was in insurrection, and therefore come within the amended Constitution of 1865, declaring them void. The provision of the State Constitution does not go upon the ground that the State bonds and bank-notes, which it declared to be invalid, were issued in aid of the rebellion, but that they were issued by a usurping government, — a reason which we have already demonstrated to be unsound. Not only is there nothing in the Constitution or laws of Tennessee to prove that these notes were issued in support of the rebellion, but there is nothing known to us in public history which leads to this conclusion. The opinion of the Supreme Court, which we have already cited, states that the bank was engaged in a legitimate business at this time, receiving deposits, and otherwise performing the functions of a bank; and though, as is abundantly evident, willing enough to repudiate these notes as receivable for taxes, that court held them to be valid issues of the bank, in the teeth of the ordinance declaring them void.

It is said, however, that considering the revolutionary character of the State government at that time, we must presume that these notes were issued to support the rebellion.

But while we have the Supreme Court of Tennessee holding that the bank during this time was engaged in a legitimate banking business, we have no evidence whatever that these notes were issued under any new law of the rebel State government, or by any interference of its officers, or that they were in any manner used to support the State government. If this were so, it would still remain that the State government was necessary to the good order of society, and that in its proper functions it was right that it should be supported.

We cannot infer, then, that these notes were issued in violation of any Federal authority.

On the other hand, if the fact be so, nothing can be easier than to plead it and prove it. Whenever such a plea is presented, we can, if it comes to us, pass intelligently on its validity. If issue is taken, the facts can be embodied in a bill of exceptions or some other form, and we can say whether those facts render the contract void. To undertake to assume the facts which are necessary to their invalidity on this record is to give to conjecture the place of proof, and to rest a judgment of the utmost importance on the existence of facts not found in the record, nor proved by any evidence of which this court can take judicial notice. We shall, when the matter is presented properly to us, be free to determine, on all the considerations applicable to the case, whether the notes that may be then in controversy are protected by the provision of the Constitution or not. And that is

the only question of which, in a case like the present, we would have jurisdiction.

The judgment of the Supreme Court of Tennessee will, therefore, be reversed, and the case remanded to that court for further proceedings in accordance with this opinion; and it is So ordered.[1]

WAITE, C. J., and BRADLEY and HARLAN, JJ., dissented.

[1] Re-affirmed in *Clark* v. *Keith*, 1882, 106 U. S. 464.

Some further judicial definitions of States or nations follow: "A distinction was taken at the bar between a State and the people of the State. It is a distinction I am not capable of comprehending. By a State forming a republic (speaking of it as a moral person) I do not mean the Legislature of the State, the Executive of the State, or the Judiciary, but all the citizens which compose that State, and are, if I may so express myself, integral parts of it; all together forming a body politic. The great distinction between monarchies and republics (at least our republics) in general is, that in the former the monarch is considered as the sovereign, and each individual of his nation as subject to him, though in some countries with many important special limitations: This, I say, is generally the case, for it has not been so universally. But in a republic, all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another but in virtue of a power constitutionally given by the whole community, and such authority, when exercised, is in effect an act of the whole community, which forms such body politic. In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in them not as so many distinct individuals, but in their politic capacity only," per Iredell, J., in *Penhallow et al.* v. *Doane's Administrators*, 1795, 3 Dall. 54, 93.

"The terms state and nation are used in the law of nations, as well as in common parlance, as importing the same thing, and imply a body of men, united together, to procure their mutual safety and advantage by means of their union. Such a society has its affairs and interests to manage; it deliberates, and takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Vattel, 1. Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, live together in the state of nature, nations or sovereign states, are to be considered as so many free persons, living together in a state of nature. Vattel, 2, § 4. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations. It is sufficient if it be really sovereign and independent: that is, it must govern itself by its own authority and laws. We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied; but whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority

(*b*) *Recognition of the Existence of a State.*

THOMPSON v. POWLES.

CHANCERY, 1828.

(2 *Simons*, 194.)

The contract in this case was for the purchase of Guatemala bonds, which were in the hands of the London agents of that government.

The plaintiff was led into the venture by the fraud and misrepresentations of the agents and their partners in guilt, and now files a bill in Chancery for the recovery of his money, the Guatemalan government having repudiated its agents and all their engagements because of these frauds.

The following is an extract from the judgment of Vice-Chancellor SHADWELL: —

"But there is this further consideration; that this is represented to have been a contract, by the plaintiff, to purchase the obligations of persons who were stated to be the government of the federal republic of Central America.

"I confess that, after all I have heard fall from the mouth of Lord Eldon, on the subject of persons representing themselves to be governments of foreign countries, which this country had not acknowledged to be governments, and which the courts cannot acknowledge them to be, till the government of the country has recognized them

is left in the administration of the state. Vattel, c. 1, pp. 16, 17." (Thompson, J., in *The Cherokee Nation* v. *The State of Georgia*, 1831, 5 Pet. 1, 52, 53.)

"The argument rests entirely upon an assumption, which, it appears to us, is certainly groundless; the assumption that personality cannot be truly predicated of a republic. A republic, acknowledged as such by our own Government, is an independent sovereign power; in other words, a state, just as certainly, and in the same sense as a monarchy, limited or absolute; and every state is a person, an artificial person in a more extensive and far higher sense than an ordinary corporation. A state, whatever may be the form of its internal government, and by whatever appellation it may be known, is, in the language of Vattel, 'a moral person, having an understanding and a will, capable of possessing and acquiring rights, and of contracting and fulfilling obligations.' (Vattel Droit des Gens, liv. 1, c. 1, § 4; *vide*, also, Wheaton's Elem. of Interna. Law, vol. 1, c. 2, §§ 1 & 2.)

"The definition given by other writers on the law of nations is substantially the same, and, indeed, it is upon the truth of this definition that the whole science of international law is founded — since it is evident, that it is only upon persons, having an understanding and a will, that law can operate. Every valid law implies the duty of obedience, and it is only by persons that obedience can be rendered. (Duer, J., in *The Republic of Mexico* v. *De Arrangoiz*, 1856, 5 Duer, 634, 636, 637). — ED.

to be so, it does appear to me that this is a contract entered into by the plaintiff for the purpose of purchasing that which, by the law of the land, he could not purchase. I think that the contract, being to purchase securities from these persons, who, as the plaintiff says, were the government of Guatemala, cannot be considered as being a contract which this court ought to sanction. The whole case being founded on that, I do not think that I could give relief to the party, who builds his case for relief entirely on a transaction originating in such a manner; and it appears to me that, on that ground, I must allow this demurrer." [1]

JONES v. UNITED STATES.

Supreme Court of the United States.

(137 *United States*, 202.)

Mr. Justice Gray delivered the opinion of the court.[2]

This was an indictment, found in the District Court of the United States for the District of Maryland, and remitted to the Circuit Court under Rev. Stat. § 1039, alleging that Henry Jones, late of that district, on Sept. 14, 1889, "at Navassa Island, a place which then and there was under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, the same being, at the time of the committing of

[1] The principal cases referred to follow :

The City of Berne v. *Bank of England*, 1804, 9 Ves. 347, in which "The Lord Chancellor would not make the order; observing, that he was much struck with the objection; and it was extremely difficult to say, a judicial court can take notice of a government never authorized by the government of the country in which that court sits; and, whether the foreign government is recognized, or not, is a matter of public notoriety."

In *Jones* v. *Garcia Del Rio*, 1823, Tur. & Rus. 297, the Lord Chancellor suggested, but did not decide, that Peru could not be recognized by the courts if its independence had not been recognized by the British Government.

In *Taylor* v. *Barclay*, 1828, 2 Sim. 213, before Vice-Chancellor Shadwell, the facts, the parties (except as to the plaintiff) and judgment were the same. Important extracts are made from this case in *Jones* v. *U. S.*, *infra*. If a foreign government has recognized the existence of a state or *de facto* government its subjects and citizens are bound by such act of recognition, *Republic of Peru* v. *Dreyfus*, 1888, L. R., 38 Ch. D. 348, and if the *de facto* government thus recognized is displaced by the *de jure* government, an act of the latter repealing and declaring void the legislative and executive acts of its *de facto* predecessor will not be binding upon the foreign state that had recognized the *de facto* government, *Republic of Peru* v. *The Peruvian Guano Co.*, 1886, L. R., 36 Ch. D. 489. — Ed.

[2] Part of the opinion is omitted. — Ed.

the offences in the manner and form as hereinafter stated by the persons hereinafter named, an island situated in the Caribbean Sea, and named Navassa Island, and which was then and there recognized and considered by the United States as containing a deposit of guano, within the meaning and terms of the laws of the United States relating to such islands, and which was then and there recognized and considered by the United States as appertaining to the United States, and which was also then and there in the possession of the United States, under the laws of the United States then and there in force relating to such islands," murdered one Thomas N. Foster, by giving him three mortal blows with an axe, of which he there died on the same day; and that other persons named aided and abetted in the murder. The indictment, after charging the murder in usual form, alleged that the District of Maryland was the District of the United States into which the defendant was afterwards first brought from the Island of Navassa.

[Act of Congress of Aug. 18, 1856, c. 164, 11 Stat. 1191, since reënacted in Title 72, §§ 5570–5578 of Revised Statutes and various documents showing that the United States claimed jurisdiction over the island, are set forth, after which the opinion proceeds as follows:—]

By the Constitution of the United States, while a crime committed within any State must be tried in that State and in a district previously ascertained by law, yet a crime not committed within any State of the Union may be tried at such place as Congress may by law have directed. Constitution, art. 3, § 2; Amendments, art. 6; *United States* v. *Dawson*, 15 How. 467, 488. Congress has directed that "the trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought." Rev. Stat. § 730. And Congress has awarded the punishment of death to the crime of murder, whether committed upon the high seas or other tide waters out of the jurisdiction of any particular State, or "within any fort, arsenal, dock-yard, magazine or in any other place or district of country under the exclusive jurisdiction of the United States." Rev. Stat. § 5339. Both these acts of Congress clearly include murder committed on any land within the exclusive jurisdiction of the United States and not within any judicial district, as well as murder committed on the high seas. *Ex parte Bollman*, 4 Cranch, 75, 136; *United States* v. *Bevans*, 3 Wheat. 336, 390, 391; *United States* v. *Arwo*, 19 Wall. 486.

By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation,

in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession, (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines), of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel, lib. 1, c. 18; Wheaton on International Law (8th ed.), §§ 161, 165, 176, note 104; Halleck on International Law, c. 6, §§ 7, 15; 1 Phillimore on International Law (3d ed.), §§ 227, 229, 230, 232, 242; 1 Calvo Droit International (4th ed.), §§ 266, 277, 300; *Whiton* v. *Albany Ins. Co.*, 109 Mass. 24, 31.

Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. *Gelston* v. *Hoyt*, 3 Wheat. 246, 324; *United States* v. *Palmer*, 3 Wheat. 610; *The Divina Pastora*, 4 Wheat. 52; *Foster* v. *Neilson*, 2 Pet. 253, 307, 309; *Keane* v. *McDonough*, 8 Pet. 308; *Garcia* v. *Lee*, 12 Pet. 511, 520; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415; *United States* v. *Yorba*, 1 Wall. 412, 423; *United States* v. *Lynde*, 11 Wall. 632, 638. It is equally well settled in England. *The Pelican*, Edw. Adm. appx. D;[1] *Taylor* v. *Barclay*, 2 Sim. 213; *Emperor of Austria* v. *Day*, 3 DeG., F. & J. 217, 221, 233; *Republic of Peru* v. *Peruvian Guano Co.*, 36 Ch. D. 489, 497; *Republic of Peru* v. *Dreyfus*, 38 Ch. D. 348, 356, 359.

In *Williams* v. *Suffolk Ins. Co.*, in an action on a policy of insurance, the following question arose in the Circuit Court, and was brought up by a certificate of division of opinion between the judges thereof:

"Whether, inasmuch as the American government has insisted and does still insist, through its regular executive authority, that the Falklands Islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres, and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayrean government to regulate, prohibit or punish; it is competent for the

[1] In the *Pelican*, 1809, cited in the text, Sir William Grant said: "It always belongs to the government of the country to determine in what relation any other country stands towards it; that is a point upon which courts of justice cannot decide." — Ed.

Circuit Court in this cause to inquire into and ascertain by other evidence the title of said government of Buenos Ayres to the sovereignty of the said Falkland Islands, and, if such evidence satisfies the court, to decide against the doctrines and claims set up and supported by the American government on this subject; or whether the action of the American government on this subject is binding and conclusive on this court as to whom the sovereignty of those islands belongs." 13 Pet. 417.

This court held that the action of the executive department on the question to whom the sovereignty of those islands belonged, was binding and conclusive upon the courts of the United States, saying: "Can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union." "In the present case, as the executive in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland Islands the fact must be taken and acted on by this court as thus asserted and maintained." 13 Pet. 420.

All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings. *United States* v. *Reynes*, 9 How. 127; *Kennett* v. *Chambers*, 14 How. 38; *Hoyt* v. *Russell*, 117 U. S. 401, 404; *Coffee* v. *Grover*, 123 U. S. 1; *State* v. *Dunwell*, 3 R. I. 127; *State* v. *Wagner*, 61 Maine, 178; *Taylor* v. *Barclay*, and *Emperor of Austria* v. *Day*, above cited; 1 Greenl. Ev. § 6.

In *United States* v. *Reynes*, upon the question whether a Spanish grant of land in Louisiana was protected, either by the treaty of retrocession from Spain to France, or by the treaty of Paris, by which the Territory of Louisiana was ceded to the United States, this court held: "The treaties above mentioned, the public acts and proclamations of the Spanish and French governments, and those of their publicly recognized agents, in carrying into effect those treaties, though not made exhibits in this cause, are historical and notorious facts, of which

the court can take regular judicial notice, and reference to which is implied in the investigation before us." 9 How. 147, 148.

In *Kennett* v. *Chambers*, a bill to compel specific performance of a contract made in the United States in September, 1836, by which a general in the Texan Army agreed to convey lands in Texas, in consideration of money paid him to aid in raising and equipping troops against Mexico, was dismissed on demurrer, because the independence of Texas, though previously declared by that State, had not then been acknowledged by the government of the United States; and the court established this conclusion by referring to messages of the President of the United States to the Senate, a letter from the President to the Governor of Tennessee, and a note from the Secretary of State to the Mexican Minister, none of which were stated in the record before the court. 14 How. 47, 48.

So in *Coffee* v. *Grover*, upon writ of error to the Supreme Court of Florida, in a case involving a title to land, claimed under conflicting grants from the State of Florida and the State of Georgia, and depending upon a disputed boundary between those States, this court ascertained the true boundary by consulting public documents, some of which had not been given in evidence at the trial, nor referred to in the opinion of the court below. 123 U. S. 11 *et seq.*

In *Taylor* v. *Barclay*, a bill in equity, based on an agreement which it alleged had been made in 1825 by agents of "the government of the Federal Republic of Central America, which was a sovereign and independent state, recognized and treated as such by His Majesty the King of these Realms," was dismissed on demurrer by Vice-Chancellor Shadwell, who said: "I have had communication with the Foreign Office, and I am authorized to state that the Federal Republic of Central America has not been recognized as an independent government by the government of this country." Inasmuch as I conceive it is the duty of the judge in every court to take notice of public matters which affect the government of this country, I conceive that, notwithstanding there is this averment in the bill I am bound to take the fact as it really exists, not as it is averred to be." "Nothing is taken to be true, except that which is properly pleaded; and I am of opinion that, when you plead that which is historically false, and which the judges are bound to take notice of as being false, it cannot be said you have properly pleaded, merely because it is averred, in plain terms; and that I must take it just as if there was no such averment on the record." 2 Sim. 220, 221, 223.

That case is in harmony with decisions made in the time of Lord Coke, and in which he took part, that against an allegation of a public act of Parliament, of which the judges ought to take notice, the other

party cannot plead *nul tiel record*, but, if the act be misrecited, ought to demur in law upon it. *The Prince's Case*, 8 Rep. 14a, 28a; *Woolsey's Case*, Godb. 178.

In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. Gresley Eq. Ev. pt. 3, c. 1; *Fremont* v. *United States*, 17 How. 542, 557; *Brown* v. *Piper*, 91 U. S. 37, 42; *State* v. *Wagner*, 61 Maine, 178. Upon the question of the existence of a public statute, or of the date when it took effect, they may consult the original roll or other official records. *Spring* v. *Eve*, 2 Mod. 240; 1 Hale's Hist. Com. Law (5th ed.) 19–21; *Gardner* v. *Collector*, 6 Wall. 419; *South Ottawa* v. *Perkins*, 94 U. S. 260, 267–269, 277; *Post* v. *Supervisors*, 105 U. S. 667. As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may require of the Foreign Office or the Department of State. *Taylor* v. *Barclay*, above quoted; *The Charkieh*, L. R. 4 Ad. & Ec. 59, 74, 86; *Ex parte Hitz*, 111 U. S. 766: *In re Baiz*, 135 U. S. 403.

In the case at bar, the indictment alleges that the Island of Navassa, on which the murder is charged to have been committed, was at the time under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, and recognized and considered by the United States as containing a deposit of guano within the meaning and terms of the laws of the United States relating to such islands, and recognized and considered by the United States as appertaining to the United States and in the possession of the United States under those laws.

These allegations, indeed, if inconsistent with facts of which the court is bound to take judicial notice, could not be treated as conclusively supporting the verdict and judgment. But, on full consideration of the matter, we are of opinion that those facts are quite in accord with the allegations of the indictment.

The power, conferred on the President of the United States by section 1 of the act of Congress of 1856, to determine that a guano island shall be considered as appertaining to the United States, being a strictly executive power, affecting foreign relations, and the manner in which his determination shall be made known not having been prescribed by statute, there can be no doubt that it may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President. *Wolsey* v. *Chapman*, 101 U. S. 755, 770; *Runkle* v. *United States*, 122 U. S. 543, 557; 11 Opinions of Attorneys-General, 397, 399.

For the reasons above stated, our conclusion is that the Guano Islands Act of Aug. 18, 1856, c. 164, reënacted in Title 72 of the Revised Statutes, is constitutional and valid; that the Island of Navassa must be considered as appertaining to the United States; that the Circuit Court of the United States for the District of Maryland had jurisdiction to try this indictment; and that there is no error in the proceedings.

Judgment affirmed.[1]

[1] In the case of *Luther* v. *Borden*, 1849, 7 How. 1, it was held that the Constitution had vested the power of recognizing a State government in Congress; that it was therefore a political and a not judicial question; that the President was vested with this power by act of Congress and that his exercise of it in this case was within the grant of this power. See *Texas* v. *White*, 1868, 7 Wall. 700, and *Taylor* and *Marshall* v. *Beckham*, 1899, 178 U. S. 548.

For an account of Dorr's Rebellion, with which the leading case of *Luther* v. *Borden* deals, see A. M. Mowry's Dorr War, 1901.

On the relation of the United States to the States of the Union, see, generally, *McCulloch* v. *Maryland*, 1819, 4 Wheat. 316; *Texas* v. *White*, *supra*; *Lane County* v. *Oregon*, 1868, 7 Wall. 71; *Tarbell's Case*, 1871, 13 Wall. 397, and *Ex parte Siebold*, 1879, 100 U. S. 371.

From the principal case, and citations both in the text and notes it appears conclusively that recognition of statehood, foreign and American, in all its various degrees, is a political, not a judicial, question, and that the court derives its knowledge of such matters from the political department. As the greater includes the lesser, recognition of belligerency and insurrection is likewise political and non-judicial. (See *The Three Friends*, 1896, 166 U. S. 1, *infra*.)

While, therefore, the question is beyond controversy, the following remarkably clear enunciation of the doctrine may be quoted: —

"These are the two views of secession on which the public men of the country divide, and between which some of them oscillate. Which shall the judicial mind adopt? I answer, that view, if it can be ascertained, which the political departments of the Federal Government have adopted. Not that the judiciary is ever, upon principle, to surrender its independence of judgment to the executive and legislative departments, but, since the foreign relations of the Federal Government are wholly entrusted to the President and Congress, the judiciary must accept them, just as they have been recognized and established by the President and Congress. *It is only from the acts and declarations of these departments that we can know, judicially, what governments exist, and what rights we concede to them.* This rule of decision was recognized by Ch. J. Marshall, in *United States* v. *Palmer*, 3 Wheat. 634, and in *Foster* v. *Neilson*, 2 Peters, 307, and was very distinctly reasserted by Mr. Justice Grier, in the Prize Cases, 2 Black, 670." *Fifield* v. *Ins. Co.*, 1864, 47 Penn. State, 166, 172, per Woodward, C. J.

It is a fundamental principle of constitutional law that a grant of power carries with it the right of discretion in its exercise (*McCulloch* v. *Maryland*, 1819, 4 Wheat. 316); it therefore follows that the wisdom or expediency of the foreign policy of our government is not subject to examination in a court of justice. The following passage shows that the policy of our government in the matter of recognition has been judicious if non-judicial:

"There is a stage in such (revolutionary) contests when the party struggling for independence has, as I conceive, a right to demand its acknowledgment by neutral

(c) *Kinds of States.*

THE HELENA.

HIGH COURT OF ADMIRALTY, 1801.

(4 *C. Robinson*, 3.)

This was a case of a British ship which had been taken on a voyage from Saffee to Lisbon by an Algerine corsair, and sold by the Dey of Algiers to a merchant of Minorca, and by him sold, on the surrender of the island of Minorca to the British arms, to the present holder, a merchant of London. On coming into the port of London, a warrant

parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when the independence is established as matter of fact, so as to leave the chance of the opposite party to recover their dominion utterly desperate. The neutral nation must, of course, judge for itself when this period has arrived; and as the belligerent nation has the same right to judge for itself, it is very likely to judge differently from the neutral and to make it a cause or pretext for war, as Great Britain did expressly against France in our Revolution, and substantially against Holland.

"If war thus results, in point of fact, from the measure of recognizing a contested independence, the moral right or wrong of the war depends upon the justice and sincerity and prudence with which the recognizing nation took the step. I am satisfied that the cause of the South Americans, so far as it consists in the assertion of independence against Spain, is just. But the justice of a cause, however it may enlist individual feelings in its favor, is not sufficient to justify third parties in siding with it. The fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty." J. Q. Adams to President Monroe, Aug. 24, 1818. (1 Wharton's Digest, 121.)

In *M'Ilvaine* v. *Coxe's Lessee*, 1808, 4 Cranch, 209, 212, the Supreme Court of the United States say: "That the several States which composed this Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it. From hence it results, that the laws of the several State governments were the laws of sovereign states, and as such were obligatory upon the people of such State from the time they were enacted." See also, *Ingliss* v. *Trustees*, &c., 1830, 3 Pet. 99.

New states may be recognized conditionally. By the 43d article of the treaty of Berlin, 1878, it is stipulated that the independence of Roumania shall be recognized by the high contracting parties "on the conditions laid down in the two following articles." These conditions are, first, that no person shall be deprived of civil or political rights by reason of his creed; and, second, that Roumania shall restore to Russia certain territory detached from Russia by the treaty of Paris, 1856.

Servia was recognized upon a similar condition as to religious freedom. (Articles 34 and 35.) — Ed.

had been applied for to arrest this ship on the part of the former British proprietor; but the court refused a warrant, and directed a monition to issue, calling on the possessor to show cause, why she should not be restored to the former British owner.

Sir W. Scott. — This is a question arising on a ship, which has been purchased by a British merchant of a Spaniard: A claim is now given on the part of the original British proprietor, on a suggestion that the vessel, while sailing his property, was captured and carried into the Barbary States, and there sold to the Spanish merchant, from whom the present holder purchased. It is certainly true, as it has been argued on the part of the present possessor, that the court is disposed to pay particular respect to derivative titles, when fairly possessed; and it does this on the plain and general ground, that there must be a sequel of transactions, continued in a course of time, which shall be held conclusive, to cure antecedent defects, and to give, security to the title of a *bonâ fide* purchaser. On this foundation all property rests; with respect to movables, the period is very short for that effect. It is true, that ships pass by formal instruments and written documents, and therefore do not come entirely under the rules that apply to the transfer of movable property; but still they are entitled to the equity of similar considerations to a certain degree, particularly where positive regulations have not intervened to exclude them. This ship appears to have been taken by the Algerines, and it is argued, that the Algerines are to be considered in this act as pirates, and that no legal conversion of property can be derived from their piratical seizure. Certain it is, that the African States were so considered many years ago, but they have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states. So long ago as the time of Charles 2d, Molloy speaks of them in language which, though sufficiently quaint, expresses the true character in which they were considered in this time. — "Pirates that have reduced themselves into a government or state, as those of Algier, Sally, Tripoli, Tunis, and the like, some do conceive ought not to obtain the rights or solemnities of war, as other towns or places: for though they acknowledge the supremacy of the Porte, yet all the power of it cannot impose on them more than their own wills voluntarily consent to. The famous Carthage having yielded to the victorious Scipio, did in some respect continue, and began to raise up her drooping towers, till the knowing Cato gave council for the total extirpation; out of the ruins of which arose Tunis, the revenging ghost of that famous city, who now, what open hostility denied, by thieving and piracy continues; as stinking elders spring from those places where noble oaks have been felled;

and in their art are become such masters, and to that degree, as to disturb the mightiest nations on the western empire; and though the same is small in bigness, yet it is great in mischief; the consideration of which put fire into the breast of the aged Lewis IX. to burn up this nest of wasps, who having equipt out a fleet in his way for Palestine, resolved to besiege it: whereupon a council of war being called, the question was, whether the same should be summoned, and carried it should not; for it was not fit the solemn ceremonies of war should be lavished away on a company of thieves and pirates. Notwithstanding this, Tunis and Tripoli and their sister Algier do at this day (though nests of pirates) obtain the right of legation. So that now (though indeed pirates) yet having acquired the reputation of a government, they cannot properly be esteemed pirates, but enemies." Molloy, p. 33, § iv.

Although their notions of justice, to be observed between nations, differ from those which we entertain, we do not on that account, venture to call in question their public acts. As to the mode of confiscation, which may have taken place on this vessel, whether by formal sentence or not, we must presume it was done regularly in their way, and according to the established custom of that part of the world. That the act of capture and condemnation was not a mere private act of depredation, is evident from this circumstance, that the Dey himself appears to have been the owner of the capturing vessel; at least he intervenes to guarantee the transfer of the ship in question to the Spanish purchaser. There might perhaps be cause of confiscation, according to their notions, for some infringment of the regulations of treaty; as it is by the law of treaty only that these nations hold themselves bound, conceiving (as some other people have foolishly imagined), that there is no other law of nations, but that which is derived from positive compact and convention. Had there been any demand for justice in that country on the part of the owners, and the Dey had refused to hear their complaints, there might perhaps have been something more like a reasonable ground to induce this court to look into the transaction, but no such application appears to have been made. The Dey intervened in the transaction, as legalizing the act. The transfer appears, besides, to have been passed in a solemn manner before the public officer of the Spanish government, the Spanish consul; and in the subsequent instance, the property is again transferred to the present possessor, under the public sanction of the Judge of the Vice Admiralty court of Minorca.

Under these circumstances, I think it is now much too late for this court to interfere for the purpose of annulling these several acts of transfer, which appear to have been made, in both instances, with

perfect good faith on the part of the several purchasers, and for an equivalent consideration. Without considering at all the question, what rule would have been applied to the case of a *bonâ fide* purchase from a piratical captor I shall dismiss the party, and decree the ship to be delivered to the British purchaser.[1]

Party dismissed.

THE CHARKIEH.

High Court of Admiralty, 1873.

(*Law Reports*, 4 *Admiralty and Ecclesiastical Courts*, 59.)

This was a cause instituted on behalf of the Netherlands Steamship Co., the owners of the steamship *Batavier*, and on behalf of the master, crew and passengers thereof against the screw steamship *Charkieh* and her freight, for damages arising out of a collision between the *Batavier* and the *Charkieh* in the river Thames in 1872.

As a bar to the action for damages resulting from the collision, it was maintained that the ship was the property of Ismail Pacha, Khedive of Egypt, the reigning sovereign of the state of Egypt and that the *Charkieh* was a public vessel of the government and semi-sovereign state of Egypt.[2]

Sir Robert Phillimore. . . . From these averments in the pleadings, and these facts in the evidence, the following questions arise:

1. Is the international status of the Khedive that of sovereign prince of Egypt?

[1] "The Algerines, Tripolitans, Tunisians, and those of Salee," says Bynkershoek, "are not pirates, but regular organized societies, who have a fixed territory and an established government, with whom we are alternately at peace and at war, as with other nations, and who, therefore, are entitled to the same rights as other independent states. The European sovereigns often enter into treaties with them, and the States-General have done it in several instances. Cicero defines a regular enemy to be: *Qui haberet rempublicam, curiam ærarium, consensum et concordiam civium rationem aliquam, si res ità tulisset, pacis et fœderis* (Philip, p. iv. c. 14). All these things are to be found among the barbarians of Africa; for they pay the same regard to treaties of peace and alliance that other nations do, who generally attend more to their convenience than to their engagements. And if they should not observe the faith of treaties with the most scrupulous respect, it cannot be well required of them; for it would be required in vain of other sovereigns. Nay, if they should even act with more injustice than other nations do, they should not, on that account, as Huberus very properly observes (De Jure Civitat. l. iii. sect. 4, c. 5, n. ult.) lose the rights and privileges of sovereign states." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. xvii. — Ed.

[2] Short statement substituted for that of the report. — Ed.

2. Is he entitled by virtue of that status to claim the exemption of this ship from the jurisdiction of this court?

3. If he be entitled to this privilege, has he waived or forfeited it? I proceed to consider these questions in their order, and first, as to the international status of His Highness the Khedive.

[After sketching the history of Egypt from Arabian conquest in 838 A.D. to the year 1833, the learned judge says:]

Here I will pause a moment to consider the law applicable to the facts as now stated.

What were the relations at this epoch existing between the Khedive and the Porte, and what was the nature and character of the authority of the former, so far as foreign states are connected with these considerations? Did they entitle the Khedive to the privilege of the sovereign of an independent state? These are questions which must be answered, like all others appertaining to international jurisprudence, by a reference to usage, authority, and the reason of the thing.

Many accredited writers and jurists have drawn a distinction, which seems not to have escaped the framer of the Khedive's petition on protest now before me — between a sovereignty absolute and pure, and that less complete and perfect dominion to which the name of half-sovereignty (*demi-souverain*) has been given. I am inclined to think that the sovereign of a state in the latter category may be entitled to require from foreign states the consideration and privileges which are unquestionably incident to the sovereign of a state who is in the former category. There are also certain acts of feudal homage, or, as jurists say, *servitutes juris gentium*, which do not disentitle the state obliged to them to an international existence as a separate state.

Some examples of half sovereignties are to be found in history. Some of the smaller states (*halb souverain*) of the German confederation, before it was virtually destroyed by Napoleon's confederation of the Rhine, and formally extinguished by the abdication of the Emperor Francis in 1806, also furnished examples of states *cum imminutione imperii* — to borrow the expression of Grotius, De Jure Belli et Pacis, lib. ii., c. xv., s. vii., 1; Cambridge edition, 1853, vol. 2, p. 136 — but entitled to be treated as states by foreign powers. The old feudal relations of the Dukes of Burgundy, Normandy, and Brittany to France did not, I believe, prevent these princes from being considered as sovereigns at home and abroad, and from being entitled to be represented by ambassadors at foreign courts.

Other instances might be mentioned, in which neither the payment of tribute, as in the cases of the Kingdom of the Two Sicilies to the Pope, continued till 1818 A.D., or of the King of Hungary to the Sultan, from the reign of Ferdinand the First till the Treaty of

Silvatorok in 1606 A.D., nor other acts of purely feudal homage, — such as the presentation of the white palfrey presented to the Pope by the King of the Two Sicilies, — See Phill. Int. Law, 2d ed., vol. 2, 434, disentitled the representative of a state in these conditions to the enjoyment abroad of the privileges usually accorded to a foreign sovereign or his representatives.

It has been well said by a commentator on Martens' work : —

" La souveraineté extérieure n'est autre chose que l'indépendance de l'État vis-à-vis des autres états." Pinheiro Ferreira on Martens, Précis du droit des gens, edited by Vergé, l. i. c. 3, s. 23, t. i. p. 98, Paris, 1858.

It may, moreover, be that, if such a status existed *de facto*, it would not be the province of the tribunals of a foreign state to look beyond the fact, or to inquire minutely or at all into the history of its establishment. International law has no concern with the form, character, or power of a state, if, through the medium of a government, it has such an independent existence as to render it capable of entertaining international relations with other states. An apt illustration of this position is furnished by the status accorded by European Powers in more modern times to what were once commonly called the Barbary States. They had practically shaken off the Ottoman dominion. Bynkershoek describes them as " civitates quæ certam sedem atque ibi imperium habent, et quibuscum nunc pax est nunc bellum, non secus ac cum aliis gentibus, quique propterea ceterorum principum jure esse videntur." Bynkershoek, Quæstiones Juris Publici, lib. i., c. 17 ; Opera Omnia, vol. 2, p. 223, ed. 1767. And in the year 1801 Lord Stowell fully adopted this position, and asserted that the African states had " long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states ; " and he remarked that, " although their notion of international justice differ from those which we entertain, we do not on that account venture to call in question their public acts," — that is to say, that although they are perhaps on some points entitled to a relaxed application of the principles of international law, derived exclusively from European custom, they are nevertheless treated as having the rights and duties of states by the civilized world: *The Helena*, 4 C. Rob. 3.

It is to be observed, however, that the court proceeded upon the principle that a nation with whom we had regular treaties was *de facto* acknowledged without a formal recognition to have what jurists have termed the right of a political personality (Klüber, § 25 — Droit des gens moderne de l'Europe, par M. A. Ott, Paris, 1861, p. 35), that is, the position of a state in the great commonwealth of nations.

If, at this period, I had been obliged to decide whether the Pacha of

Egypt was entitled to the privilege of a sovereign in this country, my decision would have been influenced by a regard to the *de facto* sovereign rights apparently exercised at this period by his Highness; and perhaps the analogy of a European state having absolute dominion over its own subjects with feudal subordination to another state might have been cited with effect.

Though, even in this crisis of the history of Egypt, when the independence of that country was so nearly established, it must be observed that no attempt appears to have been made on behalf of the Pacha to exercise the principal international attribute of sovereignty, namely, the *jus legationis*, to be represented by an ambassador or diplomatic agent at the court of foreign sovereigns; nor is there any reason to believe that such an attempt, if made, would have been successful.

But in the interval between 1833 A.D. and 1841 A.D. the scene is greatly changed.

The result, then, of the historical inquiry as to the status of his Highness the Khedive, is as follows: That in the firmans, whose authority upon this point appears to be paramount, Egypt is invariably spoken of as one of the provinces of the Ottoman Empire. That the Egyptian army is regulated as part of the military force of the Ottoman Empire. That the taxes are imposed and levied in the name of the Porte. That the treaties of the Porte are binding upon Egypt, and that she has no separate *jus legationis*. That the flag for both the army and the navy is the flag of the Porte.

All these facts, according to the unanimous opinion of accredited writers, are inconsistent and incompatible with those conditions of sovereignty which are necessary to entitle a country to be ranked as one among the great community of states.

Against this array of negative proof is to be set the solitary circumstance that the office of Khedive is hereditary. It requires but little consideration to see that this peculiarity cannot affect the question. Egypt remains a province of an empire, and does not become an empire, because her viceroy is hereditary. The viceroy does not become a sovereign prince because his sovereign permits him to transmit the viceroyalty to his descendants in the direct male line. The hereditary character does not confer on the holder, in this case, the right of making war and peace, of sending an ambassador, or of maintaining a separate military or naval force, or of governing at all, except in the name and under the authority of his sovereign.

The hereditary character of the viceroyalty may make the viceroy the chief subject of the Porte, but he is still a subject prince, and not a sovereign prince or "reigning sovereign" even "of a semi-sovereign state," according to the terms of the petition on protest.

I have one more observation to make before I leave this branch of the subject. It cannot be urged in favour of the exemption of the *Charkieh*, that, though she may have been erroneously claimed as a public vessel of the Egyptian government, it is substantially the same thing if she be a public vessel of the Ottoman government of which the government of Egypt is a part; because at the beginning of these proceedings I directed the Registrar to write the following letter to the ambassador of the Porte: — [1]

No answer has been sent to this letter, and no intervention of any sort has taken place on behalf of the Porte. Thereupon this argument occurs. — It cannot be denied that for the abuse of the privilege of the sovereign or the ambassador, some remedy must be found. It has been shown that the Khedive has six or seven ships acting as merchantmen, for whom he claims the same privilege as for the *Charkieh*, and the number may be indefinitely increased. It has been said that the remedy is to be found in an application to the sovereign to abate the abuse.

Any such application must be made in the present instance to the Porte. But the ambassador of the Porte asserts no such claim. It is the governor of a province of the state that insists upon the privilege. To communicate directly with the governor in this matter would be to derogate from the dignity of his sovereign, and to place in the rank of a sovereign a governor whom his own sovereign has placed in the rank of a subject.

Lastly, no treaty ever having been made with his Highness, no ambassador ever received from or sent to him, British consuls in Egypt receiving no exequatur from him, there being, in other words, no *de facto* recognition of his Highness as a sovereign by our government, has there been any recognition *de jure* of him in this capacity?

The Court of Chancery, when a plaintiff averred in his bill that a certain republic in Central America had been recognized as an independent government, put itself in communication with the Foreign Office, and after such communication, declared itself authorized to state that the republic in question had never been recognized by the government of this country, and on the ground that what was pleaded was "historically false," allowed a demurrer to the bill: *Taylor* v. *Barclay*, 2 Sim. 213. I have communicated with the Foreign Office, and have received the following answer to my questions, viz.: "that the Khedive has not been and is not now recognized by Her Majesty as reigning sovereign of the state of Egypt." "He is recognized by Her Majesty's government as the hereditary ruler of the province of Egypt under the supremacy of the Sultan of Turkey."

[1] Letter omitted. — Ed.

Upon all these facts I have arrived at the conclusion that independently of any other consideration, his Highness the Khedive has failed to establish his claim to exempt his vessel from the process of this court.[1]

JACK THORINGTON v. WILLIAM B. SMITH AND JOHN H. HARTLEY.

SUPREME COURT OF THE UNITED STATES. 1868.

(8 *Wallace*, 1.)

The Chief Justice [CHASE] delivered the opinion of the court.

The questions before us upon this appeal are these:

1. Can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States?

2. Can evidence be received to prove that a promise expressed to be for the payment of dollars was, in fact, made for the payment of any other than lawful dollars of the United States?

3. Does the evidence in the record establish the fact that the note for ten thousand dollars was to be paid, by agreement of the parties, in Confederate notes?

The first question is by no means free from difficulty. It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the government of the United States, by insurrectionary force. Nor is it a doubtful principle of law that no contracts made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed. But, was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the rebellion?

In examining this question the state of that part of the country in which it was made must be considered. It is familiar history, that early in 1861 the authorities of seven States, supported, as was alleged,

[1] For the present situation of Egypt, see *Abd-ul-Messih* v. *Farra*, 1888, L. R., 13 A. C. 431; Sir Alfred (Lord) Milner's "England in Egypt," (1892); White's "Expansion of Egypt," 1899.

For the international status of Cuba during the American occupation see *Neely* v. *Henkel*, 1900, 180 U. S. 109.

For the status of the American Indian tribes, or "Nations," see *The Cherokee Nation* v. *Ga.*, 1831, 5 Pet. 1, especially the concurring opinion of Mr. Justice Baldwin, 30–50. This matter is discussed in § 23, *infra*. — ED.

by popular majorities, combined for the overthrow of the National Union, and for the establishment, within its boundaries, of a separate and independent confederation. A governmental organization, representing these States, was established at Montgomery, in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent. In the course of a few months, four other States acceded to this confederation, and the seat of the central authority was transferred to Richmond, in Virginia. It was, by the central authority thus organized, and under its direction, that civil war was carried on upon a vast scale against the government of the United States for more than four years. Its power was recognized as supreme in nearly the whole of the territory of the States confederated in insurrection. It was the actual government of all the insurgent States, except those portions of them protected from its control by the presence of the armed forces of the National government.

What was the precise character of this government in contemplation of law?

It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* government will, we think, conduct us to a conclusion sufficiently accurate.

There are several degrees of what is called *de facto* government.

Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason; and under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will, in general, be respected by the government *de jure* when restored.

Examples of this description of government *de facto* are found in English history. The statute 11 Henry VII., c. 1, 2 British Stat. at Large, 82, relieves from penalties for treason all persons who, in defence of the king, for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by the lawful monarch, 4 Commentaries, 77.

But this is where the usurper obtains actual possession of the royal authority of the kingdom; not when he has succeeded only in establishing his power over particular localities. Being in possession, allegiance is due to him as king *de facto*.

Another example may be found in the government of England under

the Commonwealth, first by Parliament, and afterwards by Cromwell as Protector. It was not, in the contemplation of law, a government *de jure*, but it was a government *de facto* in the most absolute sense. It incurred obligations and made conquests which remained the obligations and conquests of England after the restoration. The better opinion doubtless is, that acts done in obedience to this government could not be justly regarded as treasonable, though in hostility to the king *de jure*. Such acts were protected from criminal prosecution by the spirit, if not by the letter, of the statute of Henry the Seventh. It was held otherwise by the judges by whom Sir Henry Vane was tried for treason, 6 State Trials, 119, in the year following the restoration. But such a judgment, in such a time, has little authority.

It is very certain that the Confederate government was never acknowledged by the United States as a *de facto* government in this sense. Nor was it acknowledged as such by other powers. No treaty was made by it with any civilized state. No obligations of a National character were created by it, binding after its dissolution, on the States which it represented, or on the National government. From a very early period of the civil war to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1), that its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful government; and (2), that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by civil authority, supported more or less directly by military force.

One example of this sort of government is found in the case of Castine, in Maine, reduced to British possession during the war of 1812. From the 1st of September, 1814, to the ratification of the treaty of peace in 1815, according to the judgment of this court in *United States* v. *Rice*, 4 Wheaton, 253, "the British government exercised all civil and military authority over the place." "The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory

upon the inhabitants who remained and submitted to the conqueror. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose." It is not to be inferred from this that the obligations of the people of Castine as citizens of the United States were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force. A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court, in *Fleming* v. *Page*, 9 Howard, 614, that, although Tampico did not become a port of the United States in consequence of that occupation, still, having come, together with the whole State of Tamaulipas, of which it was part, into the exclusive possession of the National forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.

The central government established for the insurgent States differed from the temporary governments at Castine and Tampico, in the circumstance, that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or less supreme. And we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it, in its military character, very soon after the war began, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be enemies' territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority in civil and local matters not only a necessity but a duty. Without such obedience, civil order was impossible.

It was by this government exercising its power throughout an immense territory, that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, these notes were nullities; for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable only "after

the ratification of a treaty of peace between the Confederate States and the United States of America." While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force.

It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency, cannot be regarded for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transaction in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation. The first question, therefore, must receive an affirmative answer.

The second question, Whether evidence can be received to prove that a promise, made in one of the insurgent States, and expressed to be for the payment of dollars, without qualifying words, was in fact made for the payment of any other than lawful dollars of the United States? is next to be considered.

It is quite clear that a contract to pay dollars, made between citizens of any State of the Union, while maintaining its constitutional relations with the National government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But it is equally clear, if in any other country, coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that, in a suit upon a contract to pay dollars, made in that country, evidence would be admitted to prove what kind of dollars were intended, and, if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States. Such evidence does not modify or alter the contract. It simply explains an ambiguity, which, under the general rules of evidence, may be removed by parol evidence.

We have already seen that the people of the insurgent States, under the Confederate government were, in legal contemplation, substantially in the same condition as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply in the former case would apply in the latter; and, as in the former case, the people must be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the conditions imposed by the conqueror, so in the latter case, the inhabitants must be regarded as under the authority of the insurgent belligerent power actually established as the government of the country, and contracts made with them must be interpreted and enforced with reference to the condition of things created by the acts of the governing power.

It is said, indeed, that under the insurgent government the word dollar had the same meaning as under the government of the United States; that the Confederate notes were never made a legal tender, and, therefore, that no evidence can be received to show any other meaning of the word when used in a contract. But, it must be remembered that the whole condition of things in the insurgent States was matter of fact rather than matter of law, and, as matter of fact, these notes, payable at a future and contingent day, which has not arrived and can never arrive, were forced into circulation as dollars, if not directly by the legislation, yet indirectly and quite as effectually by the acts of the insurgent government. Considered in themselves, and in the light of subsequent events, these notes had no real value, but they were made current as dollars by irresistible force. They were the only measure of value which the people had, and their use was a matter of almost absolute necessity. And this use gave them a sort of value, insignificant and precarious enough it is true, but always having a sufficiently definite relation to gold and silver, the universal measures of value, so that it was always easy to ascertain how much gold and silver was the real equivalent of a sum expressed in this currency. In the light of these facts it seems hardly less than absurd to say that these dollars must be regarded as identical in kind and value with the dollars which constitute the money of the United States. We cannot shut our eyes to the fact that they were essentially different in both respects; and it seems to us that no rule of evidence properly understood requires us to refuse, under the circumstances, to admit proof of the sense in which the word dollar is used in the contract before us. Our answer to the second question is, therefore, also in the affirmative. We are clearly of opinion that such evidence must be received in respect to such contract, in order that justice may be done between the parties, and that the party entitled to be paid in

these Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States.

We do not think it necessary to go into a detailed examination of the evidence in the record in order to vindicate our answer to the third question. It is enough to say that it has left no doubt in our minds that the note for ten thousand dollars, to enforce payment of which suit was brought in the circuit court, was to be paid, by agreement of the parties, in Confederate notes.

It follows that the decree of the circuit court must be reversed and the cause remanded, for further hearing and decree, in conformity with this opinion.

THE HOME INSURANCE COMPANY'S CASE.

COURT OF CLAIMS, 1872.

(8 *Court of Claims*, 449.)

DRAKE, Ch. J., delivered the opinion of the court.

This case, considered merely as a claim for the proceeds of cotton captured by the military forces of the United States during the rebellion, has no point of controversy. The claimant's ownership, the capture and sale of the cotton, and the payment of the proceeds thereof into the treasury, are all established. The only question raised in the case is as to the right of the claimants, a corporation created by an act passed by the Legislature of the State of Georgia, while that State was in armed rebellion against the Government of the United States, to sue in this court for the recovery of said proceeds. The counsel for the Government urge that the claimant has no legal existence entitling it to one in this court; that the act creating it was the act of a Legislature which had no lawful authority to pass any such act; that no legislation whatever of the late rebel States is entitled as a matter of right to recognition in the Union; and that, therefore, the claimant's petition should be dismissed.

The question thus presented has not, we believe, been before raised. If we were required to pass upon it without any guidance from the appellate court, we should approach its consideration with more hesitation than we now feel. But we consider the question practically decided by the Supreme Court in *Texas* v. *White* (7 Wallace, 700), where, as we conceive, the following propositions were enunciated.

1. That no rebel State ceased, by its act of secession and rebellion, to be a State of the Union.

2. That the citizens of any such State did not, by such secession and rebellion, cease to be citizens of the Union.

3. That the Legislature of any such State cannot be regarded in the courts of the United States as a lawful legislature, or its acts as lawful acts.

4. That, nevertheless, the rebel government in any such State was its only actual government, which, having displaced the regular and lawful authority, and established itself in the customary seats of power and in the exercise of the ordinary functions of administration, constituted a *de facto* government, whose acts, during its existence as such, would be effectual, and, in many respects, valid.

5. That the acts of such a *de facto* though unlawful government, which must be regarded as valid, are those that are necessary to peace and good order among citizens; such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts.

6. That the acts of such a government which must be regarded as invalid and void are those that were in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of a like nature.

From all of which propositions we deduce this general proposition as the final doctrine of that court on this subject, namely: That whatever act of the Legislature of a rebel State did not tend to further or support the rebellion, or to defeat the just rights of citizens, but related merely to the domestic affairs of the people of the State as a community aside from the connection of that people with the rebellion, is a valid act by a *de facto* though unlawful government, which will be sustained in the courts of the United States.

This seems to us to draw the only line of distinction which can well be drawn, and to be the only alternative to the entire refusal of recognition to such acts. It is clearly impossible for the judiciary to pass upon the expediency of every act of a merely municipal character passed by a rebel legislature, or to decide whether every such act was necessary to peace and good order among citizens; but there is no difficulty in applying to every such act these two simple tests: 1. Was it intended to further or support the rebellion, or to defeat the just rights of citizens? and 2. Was it intended merely to regulate the domestic affairs of the people of the State, aside from their connection with the rebellion? If the first question can be answered negatively, and the second affirmatively, then it seems to us that the ruling of the Supreme Court requires us to give effect to the act.

Any other view of the matter would, in our judgment, involve the domestic affairs of the people of the rebel States in a confusion and entanglement from which extrication would be almost impossible.

Applying to the charter of the Home Insurance Company the tests indicated, we do not find that its enactment was intended to further or support the rebellion, or to defeat the just rights of citizens; but, on the other hand, that it was intended as a means, so far as it went, of regulating the domestic affairs of the State; in which work in every civilized state the creation of corporations bears no inconsiderable part.

We therefore hold the company to have a valid existence, entitling it to sue in this court; and award judgment in its favor for the proceeds of its cotton found to have been captured.[1]

[1] Affirmed on appeal in U. S. Supreme Court, 1874, 22 Wall. 99.

Other leading cases on the status and acts of the Confederacy and of its members are: *Fifield* v. *Insurance Co.*, 1864, 47 Penn. State, 166; *Mauran* v. *Insurance Co.*, 1867, 6 Wall. 1; *Miller* v. *U. S.*, 1870, 11 Wall. 268; *Sprott* v. *U. S.*, 1874, 20 Wall. 459; *Williams* v. *Bruffy*, 1877, 96 U. S. 176; *Ford* v. *Surget*, 1878, 97 U. S. 594; *Ketcham* v. *Buckley*, 1878, 99 U. S. 188. In *Baldy* v. *Hunter*, 1897, 171 U. S. 388, Mr. Justice Harlan says (after an elaborate enumeration and discussion of the leading cases dealing with the status of Confederate States): "From these cases it may be deduced —

"That the transactions between persons actually residing within the territory dominated by the government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority; that, within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects were, during the war, under the control of the local governments constituting the so-called Confederate States.

"That what occurred or was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held to be invalid *merely* because those governments were organized in hostility to the Union established by the national Constitution; this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organized to effect a dissolution of the Union, were without blame 'except when proved to have been entered into *with actual intent* to further invasion or insurrection;' and,

"That judicial and legislative acts in the respective States composing the so-called Confederate States should be respected by the courts if they were not hostile *in their purpose* or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution."

And in the very recent case of *Oakes* v. *U. S.*, 1898, 174 U. S. 778, 794, Mr. Justice Gray, speaking for the court, says:

"The government of the Confederate States, although in no sense a government

UNDERHILL v. HERNANDEZ.

UNITED STATES CIRCUIT COURT OF APPEALS, 2D CIRCUIT, 1895.

(26 *United States Appeals*, 573.)

WALLACE, Circuit Judge, delivered the opinion of the court.

This is a writ of error by George F. Underhill, the plaintiff in the court below, to review a judgment for José Manuel Hernandez, the

de jure, and never recognized by the United States as in all respects *de facto*, yet was an organized and actual government, maintained by military power, throughout the limits of the States that adhered to it, except in those portions of them protected from its control by the presence of the armed forces of the United States; and the United States, from motives of humanity and expediency, had conceded to that government some of the rights and obligations of a belligerent. *Prize Cases*, 2 Black, 635, 673, 674; *Thorington* v. *Smith*, 8 Wall. 1, 7, 9, 10; *Ford* v. *Surget*, 97 U. S. 594, 604, 605; *The Lilla*, 2 Sprague, 177, and 2 Clifford, 169."

The Lilla referred to was a Maine brig called the *Betsy Ames*, captured by a Confederate privateer commanded by H. S. Libby, carried into Charleston, S. C., and there condemned and sold, the purchasers being John Fraser & Co. of that city. Her name was changed to the *Mary Wright*, and, loaded with cotton, under the command of Libby, she ran the blockade, arrived at Liverpool on the 2d of April, 1862, and disposed of her cargo. April 24th she was registered as a British vessel, called the *Lilla*, and in the name of R. G. B., as sole owner. A fortnight later she sailed for Nassau, N. P., under the command of A., according to her papers, but really still under command of Libby. There is evidence going to show that it was arranged that Fraser & Co. should have a steamer of theirs follow to Nassau, there take on the *Lilla's* cargo and proceed to Charleston.

Parts of the cargo were falsely documented in the name of R. G. B. for the purpose of deceiving the United States cruisers.

The vessel was seized by the United States gunboat *Quaker City*, brought in, and claimed by her original owners.

Sprague, J., decided that R. G. B. lost whatever he possessed in the cargo by reason of his falsely documenting other goods as his own to deceive belligerent cruisers and that the vessel should be restored upon the authority of the Act of 1800, Chap. 14, secs. 1, 2. U. S. Stats. at Large, 16, which provides that when a merchant vessel, belonging to any person under the protection of the United States, shall have been taken by a public enemy, and shall be recaptured by a public armed vessel of the United States, such vessel not having been condemned by competent authority before the recapture, the same shall be restored to the former owners upon payment of one-eighth part of the true value, for and in lieu of salvage. The court also says:

"The second objection to this claim is also fatal. There is no doubt that this vessel was the property of Maxwell and others, until her capture by a Confederate privateer. But it is contended that she has since been condemned and sold by a prize court in Charleston, S. C., and the purchasers conveyed her to the claimant Bushby. If this were so, of which there is no sufficient proof, still, such proceedings would not divest the title of the original owner. In the case of *The Amy Warwick* [2 Sprague 123],

defendant, entered upon the verdict of a jury, pursuant to the direction of the trial judge. The suit was for false imprisonment and assault and battery of the plaintiff, committed by the defendant at the city of Bolivar, Venezuela. The acts complained of consisted in the detention of the plaintiff at his own residence in the City of Bolivar, under a guard of soldiers stationed near the house, from August 13 to October 15, 1892, by the authority of the defendant, during which time the plaintiff was not permitted to leave the house without an escort of soldiers, and was several times refused a passport to leave the city, for which he made application to the defendant. During this period the defendant was in command of the city as a military officer. A revolution had been organized against the government of Venezuela, and an army had been mustered against the adherents of the recent president, whose term of office had expired, and who, it was claimed by the revolutionists, no longer represented the legitimate government. The principal parties to this conflict were those who recognized Palacio as their chief, and those who followed the leadership of Crespo. The defendant belonged to the revolutionary party and commanded its forces in the vicinity of Bolivar. Early in August an engagement took place between the forces of the two parties near Bolivar; the revolutionists prevailed, and on August 13, the defendant entered Bolivar at the head of his forces and assumed command of the city. From that time until the plaintiff was permitted to leave Bolivar the defendant was the civil and military chief. Early in October the revolutionary party prevailed generally, and took posses-

this Court held that treating the Confederates in some respects as belligerents was not an abandonment of sovereign rights, and by no means precluded us from treating them in other respects as rebels. Most assuredly I shall not recognize the Southern Confederates as a nation, or as having a government competent to establish prize courts. No proceedings of any such supposed tribunals can have any validity here, and a sale under them would convey no title to the purchaser, nor would it confer upon him any right to give a title to others. But it is argued that, under the Queen's proclamation, recognizing the Confederates as belligerents, a British court would hold a sale to be valid. What the decision of a British court might be upon that question we do not know, it never having been there litigated. But such a decision, if made, would be no more binding upon our courts than the political views of the British government would be upon the President or the Congress."

But generally *de facto* judgments are valid as in the case of a Spanish judgment made in Louisiana after the cession but before delivery of possession to the United States; for it was the judgment of a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, though ceded, was, *de facto*, in the possession of Spain, and subject to Spanish laws, and such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid. *Keene* v. *McDonough*, 1834, 8 Pet. 308; *Trevino* v. *Fernandez*, 1855, 13 Tex. 630, 662, 666; *Daniel* v. *Hutchinson*, 1893, 83 Tex. 51, affirming the validity of judgments of military courts established in Texas during the reconstruction period. — Ed.

sion of the capital of Venezuela, and on the 26th day of October, 1892, the Crespo government, so-called, was formally recognized as the legitimate government of Venezuela by the government of the United States, pursuant to instructions from the State department to our minister to recognize the new government, provided it was accepted by the people in possession of the power of the nation, and fully established. Foreign Relations of the United States (1892), p. 635.

The plaintiff was a citizen of the United States, who had constructed a waterworks system for the city of Bolivar, under a contract with the government, and was engaged in supplying the place with water. He also carried on a machinery repair business. The evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to operate his waterworks and his repair works for the benefit of the community and the revolutionary forces; it was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive. The trial judge ruled, at the request of the defendant, that upon these facts the plaintiff was not entitled to recover, and directed a verdict for the defendant against the exception of the plaintiff.

The important question presented by the assignments of error arises upon the exception to the direction of a verdict for the defendant. This ruling proceeded upon the ground that because the acts of the defendant were those of a military commander, representing a *de facto* government in the prosecution of a war, he was not civilly responsible therefor.

Considerations of comity, and of the highest expediency, require that the conduct of states, whether in the transactions with other States or with individuals, their own citizens or foreign citizens, should not be called in question by the legal tribunals of another jurisdiction. The citizens of a state have an adequate redress for any grievance at its hand by an appeal to the courts or the other departments of their own government. Foreign citizens can rely upon the intervention of their respective governments to redress their wrongs, even by a resort, if necessary, to the arbitrament of war. It would be not only offensive and unnecessary, but it would imperil the amicable relations between governments, and vex the peace of nations, to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states. Influenced by these reasons, and because the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers, courts and publicists have recognized the immunity of public agents from suits brought in foreign tribunals for

acts done within their own states in the exercise of the sovereignty thereof. In *Moondalay* v. *Morton*, 1 Bro. Ch., 469, 471, the Master of the Rolls, while retaining jurisdiction of a suit, which involved the private transactions of the East India Company, said: "They have rights as a sovereign power, they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here." "I admit that no suit will lie in this court against a sovereign power for anything done in that capacity." In *The Nabob of Arcot* v. *East India Co.*, 4 Bro. Ch., 180, the answer to a bill in equity alleged that all the transactions mentioned in the bill were of a political nature and matters of state; and the court dismissed the suit upon that ground. In *The Duke of Brunswick* v. *The King of Hanover*, 6 Beavan, 1, the Master of the Rolls concluded an elaborate discussion of the liability of the defendant to a suit in chancery with the opinion that the King of Hanover, although a subject of Great Britain, was exempt from all liability to be sued in the courts of this country for any acts done by him as King of Hanover. Upon an appeal from his judgment, dismissing the cause to the House of Lords, that tribunal decided that the defendant, notwithstanding he was a British subject, and was in England exercising his rights as such when sued, could not be made to account in the Court of Chancery for acts of state, whether right or wrong, done by him abroad in virtue of his authority as sovereign. The decision was put not upon the personal immunity of the sovereign from suit, but upon the principle that no court in England could sit in judgment upon the act of a sovereign effected by virtue of his sovereign authority abroad. The Lord Chancellor said that "a foreign sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country," and that "the courts of this country cannot sit in judgment upon an act of a sovereign, effected by virtue of his sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority, vested in him as sovereign." *The Duke of Brunswick* v. *The King of Hanover*, 2 H. L. Cas. 1, 16. In *Hatch* v. *Baez*, 7 Hun, 596, 599, 600, the New York Supreme Court decided that an action could not be maintained in the courts of the State against the former president of the Dominican Republic for acts done by him in his official capacity, although he had ceased to be president when the suit was brought. The court said: "We think that, by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory. * * * To make himself amenable to a foreign jurisdiction for such acts, would be a direct assault upon the sovereignty and

independence of his country. * * * The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanate from a foreign and friendly government." The law officers of the United States have uniformly advised the executive department that individuals are not answerable in foreign tribunals for acts done in their own country in behalf of their government by virtue of their official authority.

In 1794 one Collot, lately the French Governor of Guadaloupe, was arrested in this country in an action brought against him for the seizure and condemnation of a vessel. The matter having been brought to the attention of our Government, it was referred to the Attorney General, and he advised that the defendant being subject to process the Government could not then intervene, but added his opinion, "if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color, of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere *irregularity* in the exercise of his powers; and that the *extent* of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation." *Suits against Foreigners*, 1 Opin. Att. Gen. 45, 46. In 1797, in the case of Sinclair, the Attorney General expressed the opinion "that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judicial tribunal of the United States." *Actions against Foreigners*, 1 Opin. Att. Gen., 81. In 1871, in the case of the Pacific Steamship Company, the Attorney General advised the Secretary of State as follows: "It has often been laid down that, before a citizen of one country is entitled to the aid of his government in obtaining redress for wrongs done him by another government, he must have sought redress in vain from the tribunals of the offending power. The object of this rule plainly is to give the offending government an opportunity of doing justice to the injured party in its own regular way, and of thus avoiding all occasion for international discussion." *New Granadian Passenger Tax*, 13 Opin. Att. Gen. 547, 550. In 1872 in the *Case of the Steamer Tipitapa*, the Attorney General advised the Secretary of State, in a case where an officer with a party of armed men, acting under the order of the judicial officer of the port of Granada, had seized an American vessel at that port, the seizure having been made for enforcing a supposed legal right, that the "Government ought not to make reclamation in behalf of the

owner, as it is presumable that, if the proceedings were illegal, the judicial tribunals of Nicaragua will afford redress." 13 Opin. Att. Gen., 554.

Conspicuous among the acts which are sheltered by this principle of international law are those of military officers in command of the armed forces of the state. According to one of the most recent commentators upon international law (Hall's Treatise on International Law, 3d ed., § 102), officers in command of armed forces of the state, and their subordinates and soldiers, are not in any case amenable to the civil or criminal laws of a foreign state, in respect to acts done in their capacity as agents for which they would be punishable or civilly responsible if done in their private capacity. This doctrine was sanctioned by our Government in 1841, in the case of McLeod, who was under indictment for murder in a State court of New York. He had been engaged as a member of the Colonial forces in repelling an attack made on Canada by an armed force from the United States, and had assisted in the destruction of a vessel moored on the American shore of the Niagara River, during which an American citizen was killed. The British Government, through its minister at Washington, demanded his release upon the ground that the destruction of the vessel was a public act of persons in her Majesty's service, obeying orders of the superior authorities, and, therefore, according to the usages of nations, could only be the subject of discussion between the two governments. Mr. Webster, then Secretary of State, acceded to this view, stating that "the Government of the United States entertains no doubt that, after this avowal of the transaction as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law and the general usuage of civilized states, to be holden personally responsible in the ordinary tribunals of law for their participation in it."[1] The courts of New York refused to release McLeod at the intervention of the General Government, and he was tried and acquitted on proof of an alibi. The episode led to the enactment by Congress on August 29, 1842 (5 Stat. 539, c. 257, sec. 1), of the

[1] Extract from a letter written by Daniel Webster, while Secretary of State, under the direction of William Henry Harrison, President, dated at the Department of State, Washington, April 24, 1841, addressed to Mr. H. S. Fox, Envoy Extraordinary and Minister Plenipotentiary of her Britannic Majesty, in reply to a letter received from Mr. Fox, dated March 12, 1841, demanding "from the Government of the United States, formally, in the name of the British Government, the immediate release of Mr. Alexander McLeod" from arrest. The works of Daniel Webster, vol. 5, p. 253. The history of this case will be found in Mr. Webster's speech of the 6th and 7th of April, 1846, in vindication of the treaty of Washington. The works of Daniel Webster, vol. 5, p. 73.

provision, now section 753, United States Revised Statutes, by which the courts of the United States are authorized to issue a writ of *habeas corpus* where a person, "being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations.

Upon principle it cannot be important whether the acts of military authorities, when called in question, are done by the authority of a *de jure* or titular or of a *de facto* government. In either case, if they are done in the legitimate exercise of belligerent powers, they are not ordinarily attended with civil responsibility. This principle has been recognized by the Supreme Court of the United States in cases in which the civil liability of Confederate soldiers for acts done as members of the insurgent forces, during the Rebellion, was under consideration. *Ford* v. *Surget*, 97 U. S., 594; *Freeland* v. *Williams*, 131 U. S., 405. As was decided in *Williams* v. *Bruffy*, 96 U. S., 176, 185, the government of the Confederate States was a *de facto* government of an inferior class. "It never represented the nation, it never expelled the public authorities from the country, it never entered into any treaties, nor was it ever recognized as that of an independent power."

Ford v. *Surget* was an action brought by the plaintiff to recover the value of a certain cotton destroyed during the war of the rebellion in the State of Mississippi; and the court held that the defence that it was destroyed by the defendant, acting under the orders of the military authorities of the Confederate States, was a good justification. *Freeland* v. *Williams* was a bill in equity to invalidate a judgment of the court of the State of West Virginia, obtained against the defendant for a tort committed by him as a soldier of the Confederate Army. One of the questions discussed was whether the judgment was void, inasmuch as it proceeded on the ground that the defendant was civilly responsible as a trespasser for an act done by him as a Confederate soldier in accordance with the usages of civilized war. In the prevailing opinion, at p. 416, the court said: "The case as it is now presented to us shows that the trespass for which the original judgment was rendered was of that character; and it is argued with much force that the court which rendered that judgment had no jurisdiction in the case, or, at all events, had no jurisdiction to render such a judgment, and that it was therefore void. It follows from this view of the subject that the court in which it was originally rendered had no jurisdiction to set it aside or annul it without the aid of the constitutional provision of the State of West Virginia, and that, on that

ground alone, the decree that we are called upon to review must be affirmed. In this view of the subject some of the judges of this court concur." Again, the court said, at p. 418: "If it be true that, when the original act was presented to the Circuit Court of Preston County, the thing complained of was found to be an act in accordance with the usages of civilized war, during the existence of a war flagrant in that part of the country, the court should have proceeded no further, and its subsequent proceedings may be held to have been without the authority of law. While it is not necessary to hold that the judgment, as presented by the record, is absolutely void, it may be conceded that a court of equity, in a proper case, can prevent the enforcement of it." In a dissenting opinion Mr. Justice HARLAN insisted that the government was not void, but conceded that the complainant was not civilly responsible if his act was one of legitimate warfare as a soldier in the Confederate Army.

The acts of the defendant as a military commander of the revolutionary forces in the civil war in Venezuela, although performed before the revolution became successful, are sheltered by the same immunities that would surround them if they had been performed subsequently. The organization of which he was a part represented that a kind of *de facto* government which is described in *Williams* v. *Bruffy*, *supra*, p. 186: "Such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and becomes recognized, its acts from the commencement of its existence are upheld as those of an independent nation." By its success the revolutionary party vindicated its claim to recognition as the legitimate government of Venezuela, and achieved a justification in the estimation of foreign governments and their legal tribunals for the acts of its military forces, as complete and ample as though those forces had been employed by any sovereign power. After the recognition of the new government by the United States, the courts of this country must accord to those who throughout the progress of the civil war acted as the agents of the people of Venezuela the position of official representatives of the state. The act of recognition by our Government neither added to nor detracted from the responsibility of the people of Venezuela for any prior injuries which citizens of the United States may have suffered on her soil from the hands of her *de facto* authorities, but these responsibilities, in our judgment, are to be adjudicated by the two governments by international action, according to the principles of

international law applicable to such cases. For these reasons we conclude that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.

The various requests made to the court on behalf of the plaintiff for instructions to the jury either involve propositions of law, which, according to the views we have expressed, were properly refused, or propositions for the submission of questions of fact, as to which there was no conflict of evidence, and which therefore the trial judge was not required to submit to the jury. If the trial judge in directing a verdict for the defendant enunciated a rule which to its full extent may not obtain, because it implies that the defendant would not be civilly responsible, even in a court of Venezuela, for any act done by him as a military commander, his disposition of the case was nevertheless proper, and the result is not affected by his expression of an erroneous opinion.

The judgment is affirmed.[1]

Section 3. — Acquisition of Territory.

HARCOURT v. GAILLARD.

Supreme Court of the United States, 1827.

(12 *Wheaton*, 523.)

A British grant of land within the limits of the old Thirteen Colonies was made to ancestor of the plaintiff on Jan. 24, 1777, and the question in issue was whether the title to the land in controversy was in the British government or not at the date of the grant.

Mr. Justice Johnson delivered the opinion of the court: * * *

"But this is not the material fact in the case; it is this, that this limit was claimed and asserted by both of those states in the Declaration of Independence, and the right to it was established by the most solemn of all international acts, the treaty of peace. It has never been admitted by the United States, that they acquired anything by way of cession from Great Britain by that treaty. It has been viewed only as a recognition of pre-existing rights, and on that principle the soil and sovereignty, within their acknowledged limits, were as much theirs at the declaration of independence as at this

[1] Affirmed *Underhill* v. *Hernandez*, 1897, 168 U. S. 250. This case should be consulted in connection with immunity of sovereigns from suit, extraterritorial acts by order of State, *infra*. — Ed.

hour. By reference to the treaty, it will be found that it amounts to a simple recognition of the independence and the limits of the United States, without any language purporting a cession or relinquishment of right on the part of Great Britain. In the last article of the treaty of Ghent will be found a provision respecting grants of land made in the islands then in dispute between the two states, which affords an illustration of this doctrine. By that article, a stipulation is made in favor of grants before the war, but none for those which were made during the war. And such is unquestionably the law of nations. War is a suit prosecuted by the sword; and where the question to be decided is one of original claim to territory, grants of soil made *flagrante bello* by the party that fails can only derive validity from treaty stipulations."[1]

JOHNSON AND GRAHAM'S LESSEE v. WILLIAM M'INTOSH.

SUPREME COURT OF THE UNITED STATES, 1823.

(8 *Wheaton*, 543.)

Judgment — MARSHALL, C. J.[2] —

"The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois and the Praukeshaw nations; and the question is, whether this title can be recognized in the courts of the United States.

"The facts, as stated in the case argued, show the authority of the chiefs who executed this conveyance so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the

[1] In *More* v. *Steinbach*, 1887, 127 U. S. 70, 80-81, it was held that only political jurisdiction and sovereignty passed by cession and that to validate claim to a grant of land from the public domain under Mexicans in California, delivery of possession by Mexican officials was necessary to complete title; that Mexican jurisdiction over California terminated July 7, 1846, and that courts recognize that date fixed by the political party for termination of Mexican authority; that the land laws do not remain in force after cession of territory and as in the case with laws of a non-political nature; that no proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority; that an act of Congress (as Act of March 3, 1851) requiring the confirmation of all perfected as well as imperfect claims to public land was constitutional. — ED.

[2] Only so much of the decision is given as applies to discovery. — ED.

power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country.

"As the rights of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be, drawn into question; as the title to lands, especially, is and must be admitted to depend entirely upon the law of the nation in which they lie, it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of His creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

"On the discovery of this immense continent the nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the rights of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

"The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere.

"It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

"Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

"On the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded, but were

necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

"While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

"The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

"Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

"France, also, founded her title to the vast territories she claimed in America on discovery. However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. * * *

"The States of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. * * *

"No one of the powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to *Christian people*, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

"In this first effort made by the English government to acquire territory on the continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given

by this commission is confined to countries 'then unknown to all Christian people;' and of these countries Cabot was empowered to take possession in the name of the king of England, thus asserting a right to take possession notwithstanding the occupancy of the natives, who were heathen, and, at the same time, admitting any prior title of any Christian people who may have made a previous discovery. * * *

"Thus, all nations of Europe, who have acquired territory on this continent, have asserted in themselves and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. * * *

"The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees.

"The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments.

"An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians."[1]

[1] See further on the general question, *Jones* v. *U. S. supra; Stockton* v. *Williams*, 1845, 1 Doug. (Mich.) 546; *Montgomery* v. *Ives*, 1844, 13 S. & M. (Miss.) 161; *Mitchel* v. *U. S.*, 1835, 9 Pet. 711, 746–761; *U. S.* v. *Fernandez*, 1836, 10 Pet. 303; *Shively* v. *Bowlby*, 1893, 152 U. S. 1, 15, 50; *Ex Parte Ortiz*, 1900, 100 Fed. 955.

For acquisition of territory by "alluvium and increment," *The Anna*, 1805, 5 C. Rob. 373; by long possession and prescription, *Rhode Island* v. *Massachusetts*, 1846, 4 How. 591; *Virginia* v. *Tennessee*, 1892, 148 U. S. 503, 522–524, and the authorities there cited.

For non-judicial precedents, see the controversy between Gt. Britain and U. S. relative to Oregon, 1845–46, Dana's Wheaton, 250–254; Foster's Am. Dip. 302–313; the Delagoa Bay controversy, 1872, Hall's Int. Law, 122; The Santa Lucia dispute, 1 Phillimore, Int. Law, 368.

At the present time it is generally conceded that discovery alone is not enough to give title to territory; it must be followed by actual occupation.

In regard to the extent of the interior country to which the occupation of the seacoast gives title, the extravagant claim was put forward in some of the earlier charters, granting lands in North America, that such right extended from the Atlantic to the Pacific Ocean. A more reasonable rule was laid down by the U. S. Commissioners, appointed to settle the boundary of Louisiana, namely, "that when any European nation takes possession of any extent of seacoast, that possession is understood

SECTION 4. — BOUNDARIES.

FOSTER & ELAM v. NEILSON.

SUPREME COURT OF THE UNITED STATES, 1829.

(2 *Peters*, 253.)

This was the case of lands in the disputed territory between the rivers Iberville and Perdido granted to the plaintiffs by the Spanish governor. The defendant alleged that by the treaty of Ildefonso, 1800, this territory was ceded by Spain to France, and in 1803, by France to the United States. And it was a question of the interpretation of the treaty of cession.

The court refused to go into the merits of the treaty, holding itself bound by the decision of the political department of the government, as appears from the following extract from the judgment of MARSHALL, C. J.: —

"* * * In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government.

"There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

"We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed. * * *

"After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign

as extending into the interior country, to the source of the rivers emptying themselves within that coast, to all their branches, and the country they cover, and to give it a right in exclusion of all other nations to the same. — Ed.

intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its right of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion the courts of every country must respect the pronounced will of the legislature." [1]

UNITED STATES v. TEXAS.

Supreme Court of the United States, 1891.

(143 *United States*, 621.)

Mr. Justice Harlan delivered the opinion of the Court.

This suit was brought by original bill in this court pursuant to the act of May 2, 1890, providing a temporary government for the territory of Oklahoma. The 25th section recites the existence of a controversy

[1] See also, *U. S.* v. *Arredondo*, 1832, 6 Pet. 691; *Gracia* v. *Lee*, 1838, 12 Pet. 511.

"Whether or not Greer County is part of the State of Texas depends upon where the northern boundary line of our State, dividing it from Indian Territory, should be located. This is a question to be settled by the political and not the judicial department of our State government. It is judicially known to us that the political authority has always claimed the territory composing Greer County as part of the domain of our State, and has exercised acts of control over it; such as organizing it into a county and attaching it to another of our counties for judicial purposes, &c. We cannot undertake to limit the jurisdiction thus recognized and asserted by the political department, and until that department ceases to exercise such authority we must treat this county as subject to the jurisdiction of the State of Texas. *Bedel* v. *Loomis*, 11 N. H. 15; *State* v. *Dunwell*, 3 R. I. 127; *Guadalupe Co.* v. *Wilson Co.*, 58 Tex. 228; *Foster* v. *Neilson*, 2 Pet. 254; *United States* v. *Arredondo*, 6 Pet. 691." — Willie, C. J., in *Harrold* v. *Arrington*, 1885, 64 Tex. 232, 233.

In re Cooper, 1891, 143 U. S. 472, the court held *inter alia* that a treaty is the law of the land where it prescribes a rule for determining rights of citizens or subjects; that courts may not determine whether Government's action is proper in pending negotiations; that the Supreme Court has no power to determine political questions and that courts are bound by the Government's act asserting dominion over any part of the (Behring) sea.

So in the *James G. Swan*, 1892, 50 Fed. 111, the court held that the President and Congress are vested with all the responsibility and powers of the Government for determination of questions as to the maintenance and extension of our national dominion, and inasmuch as they had assumed jurisdiction and sovereignty over the waters of Behring Sea outside of the three-mile limit, the people and the courts are bound by such action. — Ed.

between the United States and the State of Texas as to the ownership of what is designated on the map of Texas as Greer County, and provides that the act shall not be construed to apply to that county until the title to the same has been adjudicated and determined to be in the United States. In order that there might be a speedy and final judicial determination of this controversy the Attorney General of the United States was authorized and directed to commence and prosecute on behalf of the United States a proper suit in equity in this court against the State of Texas, setting forth the title of the United States to the country lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the State of Texas as within its boundary. 26 Stat. 81, 92, c. 182, § 25.[1]

The relief asked is a decree determining the true line between the United States and the State of Texas, and whether the land constituting what is called "Greer County," is within the boundary and jurisdiction of the United States or of the State of Texas. The Government prays that its rights, as asserted in the bill, be established, and that it have such other relief as the nature of the case may require.

In support of the contention that the ascertainment of the boundary between a territory of the United States and one of the States of the Union is political in its nature and character, and not susceptible of judicial determination, the defendant cites *Foster* v. *Neilson*, 2 Pet. 253, 307, 309; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 21; *United States* v. *Arredondo*, 6 Pet. 691, 711; and *Garcia* v. *Lee*, 12 Pet. 511, 517.[2]

In *United States* v. *Arredondo* the court, referring to *Foster* v. *Neilson*, said: "This court did not deem the settlement of boundaries a judicial, but a political question — that it was not its duty *to lead, but to follow* the action of the other departments of the Government." The same principles were recognized in *Cherokee Nation* v. *Georgia* and *Garcia* v. *Lee*.

These authorities do not control the present case. They relate to questions of boundary between independent nations, and have no application to a question of that character arising between the general Government and one of the States composing the Union, or between two States of the Union. By the Articles of Confederation, Congress was made "the last resort on appeal in all disputes and differences" then subsisting or which thereafter might arise "between two or more States concerning boundary, jurisdiction or any other cause whatever;" the authority so conferred to be exercised by a special tribunal to be

[1] See *Harrold* v. *Arrington*, 1885, 64, Tex. 233, *ante*, for the Texan claim. — Ed.

[2] The succeeding paragraph quoting passage from *Foster* v. *Neilson*, printed *ante*, is omitted. — Ed.

organized in the mode prescribed in those Articles, and its judgment to be final and conclusive. Art. 9. At the time of the adoption of the Constitution there existed, as this court said in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 723, 724, controversies between eleven States, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended by the Constitution, we find those between two or more States. And that a controversy between two or more States, in respect to boundary, is one to which, under the Constitution, such judicial power extends, is no longer an open question in this court. The cases of *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *New Jersey* v. *New York*, 5 Pet. 284, 290; *Missouri* v. *Iowa*, 7 How. 660; *Florida* v. *Georgia*, 17 How. 478; *Alabama* v. *Georgia*, 23 How. 505; *Virginia* v. *West Virginia*, 11 Wall. 39, 55; *Missouri* v. *Kentucky*, 11 Wall. 395; *Indiana* v. *Kentucky*, 136 U. S. 479; and *Nebraska* v. *Iowa*, *ante*, 359, were all original suits, in this court, for the judicial determination of disputed boundary lines between States. In *New Jersey* v. *New York*, 5 Pet. 284, 290, Chief Justice Marshall said: "It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress." And in *Virginia* v. *West Virginia*, it was said by Mr. Justice Miller to be the established doctrine of this court "that it has jurisdiction of questions of boundary between two States of the Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding." So, in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 287, 288; "By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State, as well as of controversies between two States. * * * As to 'controversies between two or more States.' The most numerous class of which this court has entertained jurisdiction is that of controversies between two States as to the boundaries of their territory, such as were determined before the Revolution by the King in Council, and under the Articles of Confederation (while there was no national judiciary) by committees or commissioners appointed by Congress."

In view of these cases, it cannot, with propriety, be said that a question of boundary between a Territory of the United States and one of the States of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such a controversy. The important question, therefore, is, whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a State to determine the boundary between one of the Territories and such State. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that State. Of course, if no such agreement can be reached — and it seems that one is not probable — and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the Constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suit in one of the courts of Texas — that State consenting that its courts may be open for the assertion of claims against it by the United States — or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the Constitution. Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. In would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the State tribunals." Story Const., § 1674. The second alternative, above mentioned, has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.

The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States* v. *North Carolina*, 136 U. S., 211. That was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its

merits, and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits.

The Constitution extends the judicial power of the United States "to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

"In all cases, affecting ambassadors, or other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." Art. 3, § 2. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." 11th Amendment.

It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the other, on the character of the parties, whatever may be the subject of controversy. *Cohens* v. *Virginia*, 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws and treaties of the United States, and, also, one in which the United States is a party. It is, therefore, one to which, by the express words of the Constitution, the judicial power of the United States extends. That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a State, is clear; for by the Revised Statutes it is declared — as was done by the Judiciary Act of 1789 — that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where

a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Rev. Stat. § 687; Act of Sept. 24, 1789, c. 20, § 13; 1 Stat. 80. Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?

The words, in the Constitution, "in all cases * * * in which a State shall be party, the Supreme Court shall have original jurisdiction," necessarily refer to all cases mentioned in the preceding clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff. It is admitted that these words do not refer to suits brought against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign states, even where such suits arise under the Constitution, laws and treaties of the United States, because the judicial power of the United States does not extend to suits of *individuals* against States. *Hans* v. *Louisiana*, 134 U. S. 1, and authorities there cited; *North Carolina* v. *Temple*, 134 U. S. 22, 30. It is, however, said that the words last quoted refer only to suits in which a State is a party, and in which, also, the opposite party is another State of the Union or a foreign state. This cannot be correct, for it must be conceded that a State can bring an original suit in this court against a citizen of another State. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court — especially if they be suits the correct decision of which depends upon the Constitution, laws or treaties of the United States — are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States "to *all* cases," in law and equity, arising under the Constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction "in *all* cases" "in which a State shall be party," that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or

more States of the Union, and between a State of the Union and foreign states, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State.

Mr. Justice Bradley, speaking for the court in *Hans* v. *Louisiana*, 134 U. S. 1, 15, referred to what had been said by certain statesmen at the time the Constitution was under submission to the people, and said: "The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. * * * The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. App. 50. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States." That case, and others in this court relating to the suability of States, proceeded upon the broad ground that "it is inherent in the nature of sovereignty not to be amenable to the suit of an *individual* without its consent."

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people

of all the States. The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign states), and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States.

We are of opinion that this court has jurisdiction to determine the disputed question of boundary between the United States and Texas.

It is contended that, even if this court has jurisdiction, the dispute as to boundary must be determined in an action at law, and that the act of Congress requiring the institution of this suit in equity is unconstitutional and void as, in effect, declaring that legal rights shall be tried and determined as if they were equitable rights. This is not a new question in this court. It was suggested in argument, though not decided, in *Fowler* v. *Lindsey*, 3 Dall. 411, 413. Mr. Justice Washington, in that case, said: "I will not say that a State could sue at law for such an incorporeal right as that of sovereignty and jurisdiction; but even if a court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a court of equity. The State of New York might, I think, file a bill against the State of Connecticut, praying to be quieted as to the boundaries of the disputed territory; and this court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries. But the question arose directly in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 734, which was a suit in equity in this court involving the boundary

line between two States. The court said: "No court acts differently in deciding on boundary between States than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud or time or other kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied without either, they decree what and where the boundary of a farm, a manor, a province or a State is and shall be." When that case was before the court at a subsequent term, Chief Justice Taney, after stating that the case was of peculiar character, involving a question of boundary between two sovereign States, litigated in a court of justice, and that there were no precedents as to forms and modes of proceedings, said: "The subject was, however, fully considered at January term, 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion the court determined to frame their proceedings according to those which had been adopted in the English courts, in cases most analogous to this, where the boundaries of great political bodies had been brought into question. And, acting upon this principle, it was then decided, that the rules and practice of the Court of Chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded is fully stated in the opinion then delivered; and upon re-examining the subject, we are quite satisfied as to the correctness of this decision." 14 Pet. 210, 256. The above cases, *New Jersey* v. *New York*, *Missouri* v. *Iowa*, *Florida* v. *Georgia*, *Alabama* v. *Georgia*, *Virginia* v. *West Virginia*, *Missouri* v. *Kentucky*, *Indiana* v. *Kentucky*, *Nebraska* v. *Iowa*, were all original suits in equity in this court, involving the boundary of States.[1] In view of these precedents, it is scarcely necessary for the court to examine this question anew. Of course, if a suit in equity is appropriate for determining the boundary between two States, there can be no objection to the present suit as being in equity and not at law. It is not a suit simply to determine the legal title to, and the ownership of, the lands constituting Greer County. It involves the larger question of governmental authority and jurisdiction over that territory. The United States, in effect, asks the specific execution of the terms

[1] These, together with *Handly* v. *Anthony*, 1820, 5 Wheat. 374, are the leading cases on river boundaries, as well as on the question of jurisdiction. The exact references to the reports in which they are found are given in an earlier section of the opinion, *supra*.

It may be noted that *Foster* v. *Neilson* and cases cited were instances of conventional or artificial boundaries; these, on the contrary, are cases of rivers or natural boundaries. — Ed.

of the treaty of 1819, to the end that the disorder and public mischiefs that will ensue from a continuance of the present condition of things may be prevented. The agreement, embodied in the treaty, to fix the lines with precision, and to place landmarks to designate the limits of the two contracting nations, could not well be enforced by an action at law. The bill and amended bill make a case for the interposition of a court of equity.

Demurrer overruled.[1]

Section 5. — Change of Sovereignty.

(*a*) *Effect on Public Rights and Obligations.*

UNITED STATES OF AMERICA v. PRIOLEAU.

Chancery, 1866.

(35 *Law Journal, Chancery, N. S.*)

Toward the end of the civil war in the United States (1861–1865), the Confederate government having got possession of 1,365 bales of cotton in Texas, had it shipped from Galveston to Havana, where it was consigned to an agent of Fraser & Co. On the 10th of June, 1865, the cotton was shipped from Havana to Liverpool, consigned to the defendants Fraser, Trenholm & Co. (Prioleau being the English member of the firm), and was of the value of 40,000*l*. Fraser, Trenholm & Co. had made a contract with one M'Rae, general European agent of the Confederate government, to build eight steamships to be employed in transporting cotton and other produce from the Confederate States. They were to receive all consignments of said merchandise and sell the same according to the instructions they should receive for that purpose. The company were to advance the expenses of transportation, and were then to recoup themselves out of the proceeds of the consignments. They had already expended 20,000*l* for sailing expenses, to say nothing of the cost of the ships.

[1] The dissenting opinion of Fuller, C. J., with whom Lamar, J., concurred, is omitted. Grants of land within a district made by a State exercising *de facto* sovereignty over the district, in the mistaken belief that the district is included within its boundaries as ascertained by compromise between the States are void (*Coffee* v. *Grover*, 1887, 123 U. S. 1, reversing same case as reported in 19 Fla. 61 and 20 id. 64). — Ed.

For a brief but admirable statement of "Boundary Controversies and Commissions in the United States," see A. B. Hart's Foundations of American Foreign Policy, 1901, pp. 91–107.

When this consignment of cotton arrived in Liverpool, the Confederate government had been dissolved, and the Confederate States had submitted to the authority of the United States government; and the latter government filed a bill praying to have the cotton delivered up to them, and for an injunction and receiver.[1]

Judgment.— Wood, V. C.: "There are one or two points which, I think, are tolerably clear in this case. The first point is with reference to the right of the United States of America, at this moment, to the cotton, subject to the agreement. I treat it first in that way. It has scarcely been disputed on the present argument, and could hardly be disputed at any further stage of the inquiry, that the right is clear and distinct, because the cotton in question is the admitted result of funds raised by a *de facto* government, exercising authority in what were called the Confederate States of America; that is to say, several of those states which, in union, formerly constituted the United States, and which now, in fact, constitute them; and that *de facto* government, exercising its powers over a considererable number of states (more than one would be quite enough), raises money—be it by voluntary contribution, or be it by taxation, is not of much importance. The defendant Prioleau, in cross-examination, admits that they exercised considerable power of taxation; and with those means, and claiming to exercise that authority, they obtained from several of the States of America funds by which they purchased this cotton for the use of the *de facto* government. That being so, and that *de facto* government being displaced, I apprehend it is quite clear that the United States of America (that is to say, the government which has been successful in displacing the *de facto* government, and whose authority was usurped or displaced, or whatever term you may choose to apply to it), the authority being restored, stand, in reference to this cotton, in the position of those who have acquired, on behalf of the citizens of the United States, a public property; because otherwise, as has been well said, there would be no body who could sue in respect of, or deal with, property that has been raised, not by contribution of any one sovereign state (which might raise a question, owing to the peculiar constitution of the Union, if it had been raised in Virginia or Texas, or in any given State), but the cotton is the product of levies, voluntary or otherwise, on the members of the several states which have united themselves into the Confederate States of America, and which are now under the control of the present plaintiffs, and are represented, for all purposes, by the present plaintiffs. That being so, the right of the present plaintiffs to this cotton, sub-

[1] Statement of the case substituted by the Editor.

ject to this agreement is, I think, clear, because the agreement is an agreement purporting to be made on behalf of the then *de facto* existing government, and not of any other persons. That case of *The King of the Two Sicilies* and the case of *The King of Spain*, and other cases of the same kind, which it is not necessary to go through, show that whenever a government *de facto* has obtained the possession of property, as a government, and for the purposes of the government *de facto*, the government which displaces it succeeds to all the rights of the former government, and, among other things, succeeds to the property they have so acquired.[1]

"Now I come to the second head of the question, and I confess at this moment, as at present advised, I do not feel much doubt on the subject, namely, the question whether or not, taking this property, they must or must not take it subject to the agreement. It appears to me, at present, they must take it subject to the agreement. It is an agreement entered into by a *de facto* government, treating with persons who have a perfect right to deal with them. I apprehend if they had been American subjects they might do so. One of them, Prioleau, is not an American subject; he is a naturalized British subject; he would have a perfect right to deal with a *de facto* government; and it cannot be compared with any one of those cases Mr. Gifford put, of persons taking the property of another with knowledge of the rights of that other. That is a species of argument that cannot be applied to international cases of this description, and for a very good reason; if so, there would be no possibility during the existence of a government *de facto* of any person dealing with that government in any part of the world. The courts of every country recognize a government *de facto* to this extent, for the purpose of saying—you are established *de facto*, if you are carrying on the course of government, if you are allowed by those whom you affect to govern to levy taxes on them, and they pay those taxes, and contribution is made accordingly, or you are acquiring proprety, and are at war, having the rights of belligerents, not being treated as mere rebels by persons who say they are the authorized government of the country. Other nations can have nothing to do with that matter. They say we are bound to protect our subjects who treat with the existing government; and we must give to those subjects, in our country, every right which the government *de facto* can give to them, and must not allow the succeeding government to assert any right as against the contracts which have

[1] Cases referred to: *King of the Two Sicilies* v. *Willcox*, 1851, 1 Sim. N. S. 301, 332–336, where cases are elaborately cited; *Hullett* v. *King of Spain*, 1828, 1 Dow & Cl. 169 (also reported in 2 Bligh, N. S. 31, and 4 Russ. 225.) — Ed.

been entered into by the government *de facto*: but, as expressed by Lord Cranworth in the case referred to, they must succeed in every respect to the property as they find it, and subject to all the conditions and liabilities to which it is subject and by which they are bound. Otherwise, I do not see any answer to Mr. James's illustration, and I do not see why there should not have been a bill filed to have the *Alabama* delivered up; * * * because on the theory of the present plaintiffs, it was their property just as much as their cotton is now. If the case had been this (and it is the only case I can consider as making any difference, but that difference would be fatal to the plaintiffs' case in another point of view): if they had been a set of marauders, a set of robbers (as was said to be the case in the kingdom of Naples, truly or untruly), devastating the country, and acquiring property in that way, and then affecting to deal with your subjects in England, it would not be the United States, but the individuals who had been robbed and suffered, who could come as plaintiffs. The United States could only come to claim this because it has been raised by public contribution; and although the United States, who are now the government *de facto* and *de jure*, claim it as public property, yet it would not be public property unless it was raised, as I have said, by exercising the rights of government, and not by means of mere robbery and violence.

"I confess, therefore, I have so little doubt, that this agreement is one that would be binding on the plaintiffs, that I cannot act against these gentlemen without securing to them the reasonable benefit of this agreement; and I cannot put them under any terms which would exclude them from the reasonable benefit of what they are entitled to, and must be held entitled to, as I think, at the hearing of the cause."

[The Vice Chancellor then proceeds to decree that the cotton was now the property of the United States Government, but that they must take it subject to the obligations entered into respecting it by the *de facto* Confederate Government.

The defendant Prioleau was appointed receiver, with power to sell the cotton, but he was required to give security for its value ultra the 20,000*l.*, the amount of the defendant's lien.[1]]

[1] In the case of the *United States of America* v. *McRae*, 1869, *L. R.* 8 *Eq.* 69, JAMES, V. C., held, "that, upon the suppression of a rebellion, the restored legitimate government is entitled, as of right, to all moneys, goods, and treasure which were public property of the government at the time of the outbreak, such right being in no way affected by the wrongful seizure of the property by the usurping government.

"But with respect to property which has been voluntarily contributed to, or

UNITED STATES v. SMITH.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF VIRGINIA, 1877.

(1 *Hughes Reports*, 347.)

HUGHES, J. — This case is not before me upon issues of fact, but upon facts admitted by demurrer, and upon the law as arising upon the facts so admitted.

The allegations of the declaration are these:

1st. That the defendant was indebted to the insurgent government of Virginia, in the sum of $5,000, on the 2d day of April, 1865.

2d. That he promised the said government to pay the said indebtedness.

3d. That the said insurgent government was, on the 9th April, 1865, overthrown by the United States by force of arms, and the lawful authority of the United States re-established in the State; and,

4th. That the defendant, after the said 9th day of April, 1865, in consideration of the premises, undertook and promised to pay to the United States the said sum of $5,000.

The demurrer admits these allegations to be true; yet denies that they constitute a case of indebtedness by the defendant to the United States, and prays judgment, &c.

In technical strictness, by admitting the truth of these several allegations, the demurrer admits the case of the plaintiffs to be sufficient to warrant a judgment for him.

But let it be assumed that the fourth allegation, being an inference of law, is not admitted by the demurrer. Then the question for decision is, whether the United States acquired by conquest of, and succession to, the insurgent government of Virginia, on the 9th April, 1865, such a right to the money which was then due from the defendant to the insurgent State government as was valid and insufficient to raise the *assumpsit* set forth in the fourth clause of the declaration.

Stating the case differently, the question before me is, whether the United States succeeded by conquest and succession to the rights of action, as well as the property, of the insurgent State government,

acquired by, the insurrectionary government in the exercise of its usurped authority, and has been impressed in its hands with the character of public property, the legitimate government is not, on its restoration, entitled by title paramount, but as successor only (and to that extent recognizing the authority) of the displaced usurping government; and in seeking to recover such property from an agent of the displaced government can only do so to the same extent, and subject to the same rights and obligations, as if that government had not been displaced and was itself proceeding against the agent."—ED.

which was overthrown on the 9th April, 1865. If so, the law will adjudge that the defendant promised to pay to the United States the money which he thus owed to that government, and the court will render judgment against him accordingly.

As a matter of history, it cannot be disputed that it was the power of the United States, and not of any State, or of what was called the Alexandria government of Virginia, which was brought to bear against the insurrectionary government of the South; or, that the overthrow and conquest of the insurrectionary government of Virginia was in fact affected by the United States. Therefore, whatever rights of property or of action ordinarily result under the law of nations and of war from conquest, resulted to the United States, on the 9th April, 1865, and did not result to what was called the Alexandria government of Virginia.

The very able committee of the General Assembly of Virginia, Mr. Marshall at its head, which had this matter in charge, in the winter of 1865, in the report submitted through one of its members, Judge Joynes, one of the ablest and most learned judges of the State, conceded this right to the United States in their report, in which they said:

"It is very clear that the present government representing the State of Virginia cannot assert any claim to this money by right of conquest, for all the rights of conquest, whatever they be, belong to the United States."

And, therefore, the particular question for decision in this case is, whether the right of action, which the demurrer admits that the insurgent State government of Virginia had against the defendant on the 2d to the 8th April, 1865, for $5,000, passed by conquest, and, after the peace following complete conquest, to the United States, on or after the 9th April, 1865. Does succession, after complete conquest and peace, give to the conquering power the right of enforcing, by civil action, the payment of debts due, at the date of the conquest, to the conquered power? In this case it is to be observed that there was not merely a temporary conquest, and that condition of *quasi* belligerence attending such an event, but complete and final conquest producing absolute peace, and that undisputed succession of one power by the other resulting from such a conquest. It was a case of undisputed succession peacefully held after complete, final conquest.

Speaking of what passes by conquest to the conquering power, the Supreme Court of the United States says, in *United States* v. *Lyon et al.*, 16 Wallace, 435, the conquerer's "rights are no longer limited to the mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of a conquered State,

including even debts as well as personal and real property." Mr. Justice Clifford, in delivering this opinion of the court, and using the language thus quoted, simply gives expression to the settled principle of the law of nations.

In the case of *The Attorney-General of Bombay* v. *Amerchand*, cited at length in *Elphinstone* v. *Bedreechum*, 1 Knapp's P. C. Cases, 329, it was held that money in bank belonging to a conquered prince may be recovered in a suit against the banker by the conquering nation.

In the case of *United States* v. *McRae*, English Law Reports, 8 Equity Cases, p. 72, it was said by the vice-chancellor:

"I apprehend it to be *clear*, *public*, *universal* law, that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect to the public property of the displaced power, whatever may be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouse, fort, or arsenals, would, on the success of the new or restored power, vest *ipso facto* in such power, and it would have the right to *call to account any fiscal or other agent, or any debtor* or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government, the agent, debtor, or accountant having been the agent, debtor, or accountant of such persons in their character or pretended character of a government. But this is the right of succession, is the right of representation, is a right, not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights, as if that authority had not been suppressed and displaced, and was itself seeking to enforce it."[1]

All the authorities have held the same doctrine, and, indeed, it has never been disputed.

These authorities close the question in favor of the right of the

[1] "~~Therefore,~~ a bill by the United States Government, after the suppression of the rebellion, against an agent of the late Confederate government, for an account of his dealings in respect of the Confederate loan, which he was employed to raise in this country [England], was dismissed with costs, in the absence of proof that any property to which the plaintiffs were entitled in their own right, as distinguished from their right as successors of the Confederate government, ever reached the hands of the defendant, and on the plaintiff declining to have the account taken on the same footing as if taken between the Confederate government and the defendant as the agent of such government, and to pay what, on the footing of such account might be found due from them." (Quoted from 2 Phillimore's International Law, 154.) — Ed.

United States to the property of the overthrown government of Virginia, *as* the insurgent government, and to the debts due, whether from citizens or from foreigners, to that government, at the time of its overthrow.

The objection of defendant's counsel, that *assumpsit* will not lie for an obligation arising by implication from a debtor to a conquered State to the conquering government after conquest, because promises do not arise from acts of violence, is not tenable. It is not denied, it is admitted by demurrer, that the defendant by receiving from the State government before its overthrow $5,000 not due to him, became indebted to that government. It is settled law, as already shown, that a conquering power after the conquest, succeeds to the debts which were due to the conquered power. If, therefore, by the law of nations, which is part of the law of England and America, such a debt becomes due from a citizen to the conquering power, then the law of England and America, even the common law of the two countries, *implies* an *assumpsit*, a promise on the part of that citizen to pay the debt. The citizen owes the debt to some one. The money he owes does not belong to himself. He is bound in conscience to pay it to the rightful owner, who is entitled *ex quo et bono* to receive it. And the law of nations, as well as of England and America, declares that the conquering power is that rightful owner. There is no *violence* between the debtor, as such, and the conquering power. The violence was between the two governments. The debt, as a debt, becomes due to the conquering power, irrespective of the consideration whether the debtor was a combatant or a non-combatant. In his character of debtor, not in that of man or woman, combatant or non-combatant, native or foreigner, he became, *qua* debtor to the conquered power, the debtor of the conquering power.

This is not a question between soldier and citizen, growing out of acts committed while war was flagrant, in the course of the soldier's service, as in *Hughes* v. *Litsey*, 5 Am. L. Reg. 148. Nor is it a question of prize or capture *durante bello*, concerning property taken or right acquired during the progress of war, as in *Coolidge* v. *Guthrie*, 8 Id. 22; and in *Elphinstone* v. *Bedreechum*, 1 Knapp, P. C. C. 300, where the court expressly says that the capture was made *nondum cessant bello*.

The indebtedness of the defendant in this case to the insurgent government of Virginia, was not one arising *jure belli* between belligerents, but by contract between friends. It is true that the succession of the United States to the insurgent government was an event *durante bello;* but that event having been completed, the indebtedness of the defendant to the succeeding government arising after the close of the

war, was not an indebtedness *jure belli*, but by contract. Being indebted, the implied *assumpsit* of the defendant to pay, his promise to pay, is a common law obligation. A debtor may be liable in *assumpsit* to a creditor, but if by violence the creditor is killed, the debtor then becomes liable in *assumpsit* to the creditor's administrator.

I do not think, therefore, with defendant's counsel, that this is a case of first impression. It is an action at common law, founded upon a contract arising of common law implication, and as such, is not new or unprecedented.

Nor is the objection of defendant's counsel tenable, which they take on the score of the jurisdiction of the court. The circuit courts of the United States have original cognizance "of all suits at common law, etc., etc., where the United States is plaintiff" (*see* clause 3 of section 629, U. S. R. S.), or in other words "of all suits of a civil nature at common law or in equity, etc., etc., in which the United States is plaintiff, etc., etc." (Section 1, Jurisdiction Act of March 3d, 1875). These definitions of jurisdiction do not refer to the *claim* sued upon, its character or its origin, but only to the nature and form of the *action* which may be made the instrument for establishing the demand. A citizen of the United States, indebted to a citizen of France by a contract made in Paris, may be sued in the Circuit Court of the United States for the district in which he resides in this country. His *demand* is not a common law demand, but if sued upon it, in an action at law, the *suit* is in form and character a suit at common law. He may be sued in *assumpsit*, if the demand be such as to make that form of action proper. So a demand arising *durante bello*, and not arising at common law, may be sued upon in an action at common law in this country, either in a State or Federal court. Under whatever law, whether of peace or war, of the domicile or foreign jurisdiction, the obligation of the defendant arises, the suit proper to enforce it according to the forms of action employed in England or this country, whether it be at common law or in equity, may be brought in the Federal courts, if the courts have jurisdiction of the parties to the suit.

As to the proposition of defendant's counsel, that this money is a trust fund, and the execution or abuse of the trust must be examined into by Virginia alone, — that is a question not yet arising in the cause, and it does not appear how it will arise. This State has, by adopting the report of the committee of 1865, and by long inaction, declined to look into or after the trust, if such it be. The defendant has put in no plea in the cause claiming that he has discharged his fiduciary obligations in respect to the debt as a trust fund. And it is not until all action of the sort has seemed to have become wholly improbable, that the United States have now moved in the matter.

As a preliminary step to devoting the fund to its trust purposes, it would seem incumbent that the person charged with the legal title in trust should proceed to collect it in, and as the legal title, by the law of nations and of the land, is in the United States, we have a right to presume that, if the fund bears the character of a trust, the United States will, after collecting it, give to it the direction required by the trust.

As to the proposition of defendant's counsel, that the war of the United States was not against the insurgent government of Virginia, and that the overthrow of that government was not a conquest, but only the setting aside of one government and the assumption of its functions by another, it can hardly find acceptance in view of the facts of history. The event happened at the close of a frightful war, and was directly produced by arms, and by armies in the field. The power of the United States was directed against the insurgent State governments, even more than against their confederated authorities. The war was conducted for the overthrow of those governments. When *they* were crushed, the war ceased, and the historical facts of conquest cannot be changed or obliterated by the employment of theoretic paraphrases in speaking of it. As to the insurgent State governments, it was a conquest, and was followed by the legal results of conquest. This debt is due. It is due to some rightful claimant, and I think the law makes it sufficiently apparent who that claimant is.

The demurrer must be overruled.[1]

[1] "In war, the public property of an enemy captured on land becomes, for the time being at least, the property of the conqueror. No judicial proceeding is necessary to pass the title. Usually the ultimate ownership of real property is settled by the treaty of peace, but so long as it is held and not surrendered by a treaty or otherwise it remains the property of the conqueror.

"This well-settled principle in the law of war was recognized by this court in *United States* v. *Huckabee*, 16 Wallace, 434, as applicable to the late civil war. At the close of that war there was no treaty. When the insurrection was put down the government of the insurgents was broken up and there was no power to treat with. Hence the title to all captured property of the confederate government then became absolute in the United States" (Chase, C. J., in *Titus* v. *U. S.*, 1874, 20 Wall. 475, 481, 482). See, also, *Whitfield* v. *U. S.*, 1875, 92 U. S. 165.

In the case of the Texan Bonds (1 Wharton's Digest, 20-23), Mr. Upham, commissioner, in delivering his opinion, said: —

"The matter of the indebtedness of Texas was a distinct subject of agreement by the terms of the union. According to those terms the vacant and unappropriated lands within the limits of Texas were to be retained by her, 'and applied to the payment of the debts and liabilities of the Republic of Texas, and the residue of the lands, after discharging these debts and liabilities, was to be disposed of as the State might direct, but in no event were the debts and liabilities to become a charge upon the Government of the United States.' (U. S. Statutes at Large, vol. 5, p. 798.)

"The lands of Texas were thus specifically set apart for the payment of the debts

(*b*) *Effect on Private Rights.*

THE UNITED STATES v. PERCHEMAN.

SUPREME COURT OF THE UNITED STATES, 1833.

(7 *Peters*, 51.)

Juan Percheman claimed two thousand acres of land lying in the territory of Florida, by virtue of a grant of the Spanish governor of that province made in 1815. After the cession of Florida to the United

of Texas, by agreement of the two governments, in addition to any separate pledge Texas had previously made of this class of property, for the payment of her debts.

"The United States subsequently, by act of Congress, on the 9th of September, 1850, on condition of the cession of large tracts of these lands, agreed to pay Texas $10,000,000, but stipulated 'that $5,000,000 of the amount should be retained in the United States treasury until creditors, holding bonds, for which duties on imports were specifically pledged, should file releases of all claims against the United States." (U. S. Statutes at Large, vol. 9, ch. 49, p. 446.)

"It thus appears that the United States has acted, from the outset, in concert with Texas, in causing express provision to be made for the payment of these debts.

"A difficulty early arose in carrying the law, above cited, into effect, for the reason that the pledge of payment of the debts of Texas was made generally upon her revenues, and was not specific 'on imposts' *eo nomine*, and for the further reason that doubts arose whether any portion of the debts could be paid under this contract, unless the whole could be discharged."

(Report of the commission of claims under the convention of 1853.)

Mr. Dana says of this case: —

"It certainly would not be satisfactory to say that the United States discharges its obligation to the creditors of Texas, to whom her customs were pledged, by paying only the amount of the customs received.

"The United States determines what those duties shall be, in reference to the interest and policy of the whole republic. The condition of Texas is changed by her annexation. The new government has a large control over the material resources of the inhabitants, in the way of internal revenues, excise or direct taxation, in its demands on the services of the people, and in the debts it can impose; in fact, the entire public system of Texas has passed into other hands, and no such state of things any longer exists as that to which the creditor looked. It may be better or worse, but it is not the same; and, if the duties laid by the United States and collected in Texan ports did not in fact pay the debts, it would be unjust for the United States to limit the payment of the creditor to them. The truth is, by the annexation the United States changed the nature of the thing pledged, and is bound generally to do equity to the creditor." (Dana's Wheaton, note 18.)

Mr. Lawrence says: "The liability of the United States for the debts of Texas came before the mixed commission, under the convention with England of 1853, in the case of a British subject who had received before the annexation, bonds secured by a pledge of the faith and revenue of Texas. It was disposed of on the ground that never having been made a subject for international interposition against the United States, it did not fall within the scope of the convention; but it seemed to be admitted that

States by the treaty of 1819, this claim was rejected by the United States commissioners appointed to settle claims to territory in Florida; and the question then came before the court for decision, from the opinion of which the following extract from page 86 is given:

Mr. Chief Justice MARSHALL delivered the opinion of the court:[1] —

the liability of the United States, if any, arose, not from the merger, but from the transfer, under the Constitution of the United States, to the Federal Government of the duties on imports. It was said by the American commissioner, in announcing his opinion, that it was an inaccurate view of the case to regard this annexation as an entire adoption of one nation and its revenues by another. 'Texas is still a sovereign State, with all the rights and capacities of government, except that her international relations are controlled by the United States, and she has transferred to the United States her right of duties on imports.'

"And he seemed to consider any claim arising from the previous pledge of such duties to be limited to their value. The British commissioner held that the obligation of Texas to pay her debts is not in dispute, nor has it been argued that the mere act of her annexation to the United States has transferred her liabilities to the Federal Government, though certainly, as regards foreign governments, the United States is now bound to see that the obligations of Texas are fulfilled. It is the transfer of the integral revenues of Texas to the Federal Government that is relied on as creating the new liability."

(Decisions of the Commission of Claims under the convention of 1853, 405–420, Lawrence's Wheaton, ed. 1863, p. 54, note).

See, also, Magoon's Law of Civil Government under Military Occupation (2d. ed. 1902) pp. 177–193 (especially at p. 190); 529–531; 630–646.

When Lombardy and Venice were respectively acquired by Italy at the close of the wars of 1859 and 1866 with Austria, the Italian government assumed no part of the general debt of Austria, but only the local debts of the ceded provinces. So, in the case of the cession of Alsace and Lorraine to Germany in 1871, no part of the French national debt was assumed by Germany on their account. (Bluntschli: Droit International, Article 48.)

On the other hand, on the seizure of Schleswig-Holstein by Prussia, in 1866, the debt of Denmark was divided between that country and Schleswig-Holstein; "and in the same year, Italy, by convention with France, took upon itself so much of the Papal debt as was proportionate to the revenues of the Papal provinces which it had appropriated." (Hall's Int. Law, 104, note.)

The following passage states briefly the general doctrine of publicists: —

"It is well to be understood, at a period when alterations in the constitutions of governments, and revolutions in states, are familiar, that it is a clear position of the law of nations, that treaties are not affected, nor positive obligations of any kind with other powers, or with creditors, weakened, by any such mutations. A state neither loses any of its rights, nor is discharged from any of its duties, by a change in the form of its civil government. The body politic is still the same, though it may have a different organ of communication. So, if a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common." (1 Kent's Com., 25.) — ED.

[1] That part of the opinion is omitted which discusses the power of the conqueror to confirm and to regulate procedure to confirm inchoate titles to land. The case itself as well as cases cited in the note clearly establish the right. — ED.

"It may not be unworthy of remark that it is very unusual even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. * * *

"A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property." [1]

[1] Followed in: *Mutual Asso. Soc.* v. *Watts*, 1816, 1 Wheat. 279; *Mitchel et al.* v. *U. S.*, 1835, 9 Pet. 711, 734–736, 749; *Strother* v. *Lucas*, 1838, 12 Pet. 410; *U. S.* v. *Clarke's Heirs*, 1842, 16 Pet. 228; *Airhart* v. *Massieu*, 1878, 98 U. S. 491; *Kinkead* v. *U. S.*, 1893, 150 U. S. 483, to the effect that fixtures attached to land pass with cession of land.

Distinguished in: *Garcia* v. *Lee*, 1838, 12 Pet. 511; *U. S.* v. *Wiggins*, 1840, 14 Pet. 334; *U. S.* v. *Miranda et al.*, 1853, 16 Pet. 153; *Chavez* v. *Chavez de Sanchez*, 1893, 7 New Mex. 58.

Followed in State Courts: *Hall* v. *Root*, 1851, 19 Ala. 378; *Teschemacher* v. *Thompson*, 1861, 18 Calif. 11, 22–25 (opinion of Field, C. J.); *Minturn* v. *Brower*, 1864, 24 Calif. 644, 660 *et seq.*; *Little* v. *Watson*, 1850, 32 Me. 214; *May* v. *Specht et al.*, 1849, 1 Mich. 187; *Sanborn* v. *Vance*, 1888, 69 Mich. 224; *Roussin* v. *Parks*, 1844, 8 Mo. 528; *Charlotte* (of color) v. *Chouteau*, 1857, 25 Mo. 465, 478–479; *U. S.* v. *Lucero*, 1869, 1 New Mex. 422; *Browning* v. *Browning*, 1886, 3 New Mex. 371; *Barnett* v. *Barnett*, 1897, 9 New Mex. 205, 211–213.

See especially, *Leitensdorfer* v. *Webb*, 1857, 20 How. 176, *infra*. See brief note on *Barnett* v. *Barnett*, in 11 Harv. Law Rev. 343. — ED.

THE UNITED STATES v. REPENTIGNY.

SUPREME COURT OF THE UNITED STATES, 1866.

(5 *Wallace*, 211.)

Mr. Justice NELSON delivered the opinion of the court.[1]

The bill in this case was filed in the court below to recover possession of a large tract of land of six leagues square, fronting on the River Ste. Marie, at the Saut, which connects the waters of Lake Superior with those of Lake Huron, in the State of Michigan. The grant of the land was made on the 18th October, 1750, by the governor and intendant-general of Canada (then called New France) to Louis De Bonne, a captain of infantry, and Count Repentigny, an ensign, in the French army. The complainants derive title under them. It was confirmed by the King of France the next year, on the 24th June, 1751.

The grant was to De Bonne and Repentigny, their heirs and assigns, "in perpetuity by title of feof and seigniory," with all the customary rights belonging to that species of estate. Repentigny went into possession about the date of the grant, at the Saut, having about the same time received an appointment to command the military post established there. He constructed a small stockade fort, and made some improvements in connection with it, such as the clearing of a few acres of land and the erection of huts for the people with him, and continued thus engaged till 1754. When war broke out between France and England he was called away into active military service of the government, and never afterwards returned. De Bonne never took personal possession, or possession of any other character, except that derived from the transient occupation of his co-tenant.

The bill was filed on the 9th January, 1861, one hundred and ten years since the date of the grant.

This act of 1860, which authorizes the institution of these proceedings, was passed in pursuance of petitions to Congress by the representatives of the original grantees. The first notice to this government of any claim to the lands on their behalf was in the year 1825 or 1826, some seventy-five years after the date of the grant. Since then the subject has, from time to time, been brought to the attention of Congress, and finally disposed of by the passage of the act in question. The act, as we have seen, refers the claimants to the judiciary for relief, and prescribes the principles which shall govern it in hearing and adjudicating upon the case. They are —

[1] Statement of facts of the case omitted. — ED.

1. The law of nations.
2. The laws of the country from which the title was derived.
3. The principles of justice.
4. The stipulations of treaties.

In the light of these principles, we shall proceed to an examination of the claim; and, first, as to the claim of the representatives of Repentigny. He was a native of Canada, and a captain in the French army at the close of the war, which terminated in the surrender of that province to the British forces, in 1760. His family was among the earliest emigrants to the country after possession had been taken by the King of France, and held high and influential positions in the government. Soon after the execution of the definitive treaty of peace of 1763, the Governor of Canada opened a correspondence with Repentigny to induce him to remain in the province, and become a subject of Great Britain, promising him protection and advancement in his profession. He was then about thirty-eight years of age. But he declined all the advances made to him, and soon after left the country, by order of his superior officer, to take a command on the Island of Newfoundland, where the Indians were disturbing the settlers, and spent the rest of his life in the military service of France, having risen to the rank of Major-General and Governor of Senegal, on the Island of Goree, and its dependencies. He died in 1786, leaving a son Gaspard, an officer in the French naval service, from whom the present claimants descended, and who reside in the Island of Guadaloupe. The preliminary treaty of the 3d November, 1762, at the surrender of Canada, provided in the second article, in behalf of his Britannic majesty, that the French inhabitants, or others who would have been subjects of the Most Christian King, in Canada, may retire in all safety and freedom, wherever they please, and may sell their estates, provided it be to his Britannic majesty's subjects, and transport their effects, as well as their persons, without being restrained in their emigration, under any pretence whatsoever, except debts or criminal prosecutions, — the term limited for this emigration being the space of eighteen months, to be computed from the day of the ratification of the definitive treaty. The definitive treaty of the 10th February of 1763 contained a similar article.

The articles of capitulation at Montreal, dated 8th September, 1760, when the Canadas were given up to the British forces, secured to the inhabitants their property, movable and immovable; and the proclamation of the king, under date of 7th October, 1763, pledged to his loving subjects of Canada his paternal care for the security of the liberty and property of those who are, or should become, inhabitants thereof. These pledges, both before and after the treaty, were but the recogni-

tion of the modern usages of civilized nations which have acquired the force of law, even in the case of an absolute and unqualified conquest of the enemy's country. But the rule is limited, as in the pledge of the king, in his proclamation to the inhabitants of the conquered territory, to those who remain and become the subjects or citizens of the victorious sovereign, — those who, in the language of Chief Justice Marshall, change their allegiance, and where the relations to their ancient sovereign are dissolved. Speaking of the cession of Florida, he observed: "Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change." *United States* v. *Percheman*, 7 Peters, 51–87.

Another rule of public law, kindred to this one is, that the conqueror who has obtained permanent possession of the enemy's country has the right to forbid the departure of his new subjects or citizens from it, and to exercise his sovereign authority over them. Hence the stipulation in the capitulation and treaties of cession providing for the emigration of those inhabitants who desire to adhere to their ancient allegiance, usually fixing a limited period within which to leave the country, and frequently extending to them the privilege, in the meantime, of selling their property, collecting their debts, and carrying with them their effects.

Now, in view of these principles, it is apparent that Repentigny, having refused to continue an inhabitant of Canada, and to become a subject of Great Britain, but, on the contrary, elected to adhere in his allegiance to his native sovereign, and to continue in his service, deprived himself of any protection or security of his property, except so far as it was secured by the treaty. That protection, as we have seen, was limited to the privilege of sale or sales to British subjects, and to carry with him his effects, at any time within eighteen months from its ratification. Whatever property was left unsold was abandoned to the conqueror. Repentigny acted upon this view of his rights. Besides the property in question, he owned and possessed a seigniory situate above Montreal, on the River St. Lawrence, called La Chenay, which he sold to Colonel Christie, a British officer, and in the deed it is recited that he had a mind to go to France, and therefore, as allowed by the late treaty of peace, was disposed to sell, &c. This was in 1766, although it appears that steps had been taken in respect to the sale at an earlier day. It is evident, also, that he had been engaged in negotiating for the sale of the seigniory in question, as in a memorial of his services presented to the chief of the bureau of the French colonies, he states, under date of 1765, that the establishment, — referring

to that at the Saut Ste. Marie, — was burnt in 1762 by the Indians, at the time his attorney was negotiating at Montreal with the English for the sale of it. And, in 1772, in a communication to the French authorities on the subject of military services and sacrifices, he observes: "I thought that after a lease of thirty years of services, fulfilled with honor in the colonies, and the sacrifice of a fortune more than reasonable, in leaving Canada, my native country, I should be able at forty-five years of age to claim a regiment in the colonies without too much ambition." And again, in answer to an intimation that the king would give him permission to retire, he observes: "If I had not calculated upon dying in the service, I should not have sacrificed more than four-fifths of my fortune, my well-being, and that of my family, in abandoning Canada, my country."

And, further, in a communication to his government, supposed to be about 1773 or 1774, he observed: "The cession of Canada, my country, has overturned a fortune more than moderate, which I could preserve only by an oath of fidelity to the new master, which was too hard for my heart. The offers of the English ministry made to my eldest brother to retain us in their service are unequivocal proofs of the consideration we enjoyed in Canada."

Repentigny was a gentleman of education and high intelligence. He rose to the rank of general in the army, and aspired to that of Marshal of France; was Governor of Senegal and its dependencies, and, as is obvious from his correspondence with his government, comprehended fully the principles of public law which forfeited all his property left unsold at the time he retired from Canada, under the provisions of the treaty.

He died in 1786, twenty-three years after the date of the treaty; and, during all this time, not only set up no claim to this seigniory, but, on the contrary, repeatedly, as we have seen, urged the patriotic sacrifice of it to his government, as a merit for her favorable consideration of himself and family. And we may add that his only son, an officer in the French navy, and who died in 1808, at the age of fifty-five, also never set up any claim or right to it to this government, and the first notice she had of it, so far as the record discloses, was in 1824 or 1825, from the descendants of this son residing in the Island Guadaloupe, and who are the complainants in the suit.[1]

The purposes for which this grant was made, and the conditions annexed to it, are specifically stated upon its face. It recites that Repentigny and De Bonne — entertaining the purpose of establishing a seigniory — had cast their eyes upon a place called the Saut Ste.

[1] That part of the opinion dealing with the moiety claimed under De Bonne is omitted. — Ed.

Marie; that a settlement in that place would be most useful for voyageurs from the neighboring ports and those from the western sea, who could there find a safe retreat, and by proper precautions, which the petitioners proposed to take, would destroy in those parts the trade of Indians with the English; and (after the words of concession of six leagues in front on the river at the Saut, and six in depth) it provides that the grantees shall hold and possess the same by themselves, and cause the same to be held and possessed by their tenants, and cause all others to desert and give up the land, and "in default thereof the present concession shall be and shall remain null." In the deed of confirmation, by the king, is the following clause: "That they (the grantees) improve the said concession, and use and occupy the same by their tenants. In default thereof the same shall be reunited to his majesty's domain;" and, in a subsequent clause: "His majesty ordering that the said concession shall be subject to the conditions above expressed, without any pretext that they should not have been stipulated in the said concession."

There is a letter in the record from the Governor-General of Canada, under date of October 5, 1771, to the government at Paris, giving the reasons for this concession. He writes: "I had the honor to let you know (by a former letter) that in order to thwart the movements that the English do not cease to make to seduce the Indian nations of the north, I had sent Sr. Chevalier Repentigny to the Saut of Ste. Marie, to make there an establishment at his own expense, and to build a palisade fort to stop the Indians of the northern posts, who go to and from the English, to intercept the commerce they carry on, and to stop and prevent the talks, and also the presents which the English send these nations to corrupt them and get them in their interests. Moreover, I had in view in that establishment to secure a retreat to the French voyageurs, especially those who trade in the northern parts, and for the purpose to clear the lands which are proper for the production of Indian corn, and to sustain thereby the victualling the people of the said post, and even to the needs of the voyageurs."

And in a letter, by the minister at Paris, to a high official in Canada, he alludes to that of the governor above referred to, and observes, "In one of my despatches last year to the governor, I had intimated to him that I had approved the construction of a fort at the Saut of Ste. Marie, and the project of cultivating the land there, and raising cattle. We cannot but approve the dispositions which have been made for the execution of that establishment, but it must be considered that the cultivation of the lands, and the multiplication of cattle must be the principal object, and that trade must be only accessory. As it can hardly be expected, he observes, that any other grain than corn will

grow there, it is necessary, at least for a while, to stick to it, and not to persevere stubbornly in trying to raise wheat."

The purposes and conditions of the grant are too obvious to require further comment.

It is admitted by the learned and intelligent jurists of Canada, who have been examined as witnesses in this case, that the legal liabilities to seigniural reunion to the royal domain exists in cases of the non-fulfilment of the conditions of settlement, and which is rigorously enforced if there be no cleared lands and no settlers on the seigniory. That the right to resume the grant applies only to unimproved seigniories, to all those that have been neglected, as it respects the establishment of tenants upon the lands, and the consequent absence of cultivation, such as clearing the forests, converting them into fruitful fields, laying out and working public roads, building mills for the convenience of the tenants, and the like.

We agree to this interpretation of the conditions. We cannot, however, assent to the next position taken, namely, that the possession and improvement of Repentigny, during the four years that he occupied the seigniory at the Saut, should be regarded as a fulfilment of this condition. It contained over two hundred thousand acres of land, and the whole of the improvements claimed in his behalf, besides the stockade fort, consisted in the erection of three or four temporary huts for laborers, the clearing of a few acres of land around the fort, and planting the same with Indian corn. His stock consisted of seven head of cattle and two horses, and, since 1754, over a century before the commencement of this suit, there has been no possession or occupancy by either of the grantees, or their descendants, tenants, or assigns, or further trace of improvements. The primeval forest remained unbroken till settlers entered upon it and established themselves under the protection of the laws, and regulations in pursuance thereof, of the United States.

The United States succeeded to all the rights to this territory that existed in the King of France, under the treaty of 1783, with Great Britain, at the close of the Revolution. The United States then became the lord paramount of this seigniory, and were thereby invested with the power to deal with the seigniorial estate, the same as the King of France, had it continued under his dominion; and we agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant, is subject to the legislative authority of the gov-

ernment. It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings. *Fairfax* v. *Hunter*, 7 Cranch, 603, 622, 631; *Smith* v. *Maryland*, 6 id. 286. In the present instance we have seen the laws have been extended over this tract, the lands surveyed, and put on sale, and confirmed to the occupants or purchasers, and, in the meantime, an opportunity given to all settlers and claimants to come in before a board of commissioners and exhibit their claims. This is a legislative equivalent for the reunion by office found.

Upon the whole we are quite satisfied that, consistent with the principles, in the light of which we are directed by the act of Congress to examine into the validity of this title, the complainants have failed to establish it. We have felt justified in applying to the case these principles with reasonable strictness and particularity, as it is nearly, if not wholly, destitute of merit.

Decree of the court below reversed, and case remanded with directions to Dismiss the bill.[1]

(*c*) *Effect on Law.*[2]

BLANKARD v. GALDY.

KING'S BENCH, 1693.

(2 *Salkeld*, 411.)

In debt on a bond, the defendant prayed oyer of the condition, and pleaded the statute E. 6, against buying offices concerning the administration of justice; and averred, That this bond was given for the purchase of the office of provost-marshal in Jamaica, and that it concerned the administration of justice, and that Jamaica is part of the revenue and possessions of the Crown of England: The plaintiff replied, that Jamaica is an island beyond the seas, which was conquered from the Indians and Spaniards in Queen Elizabeth's time, and the inhabitants are governed by their own laws, and not by the laws of England: The defendant rejoined, That before such conquest they were governed by their own laws; but since that, by the laws of England: Shower

[1] This case has been repeatedly cited and approved by the Supreme Court, most forcibly and aptly perhaps in *New York Indians* v. *U. S.*, 1897, 1, 25. For the question of citizenship of inhabitants of the provinces ceded by Spain to United States in consequence of the recent Spanish-American war, see Art. IX., of the Treaty of Paris, 1898, and Magoon's Military Occupation, 173–177. — ED.

[2] The cases and notes in this subsection are through the courtesy of Professor Beale printed from his Cases on the Conflict of Laws (1900), vol. 1, pp. 65–84. — ED.

argued for the plaintiff, that on a judgment in Jamaica, no writ of error lies here, but only an appeal to the Council; and as they are not represented in our Parliament, so they are not bound by our statutes, unless specially named. *Vide* And. 115. Pemberton *contra* argued, that by the conquest of a nation, its liberties, rights, and properties are quite lost; that by consequence their laws are lost too, for the law is but the rule and guard of the other; those that conquer cannot by their victory lose their laws, and become subject to others. *Vide* Vaugh. 405. That error lies here upon a judgment in Jamaica, which could not be if they were not under the same law. *Et per* HOLT, C. J. & Cur. —

First, in case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there; so it seemed to be agreed.

Secondly, Jamaica being conquered, and not pleaded to be parcel of the kingdom of England, but part of the possessions and revenue of the Crown of England, the laws of England did not take place there, until declared so by the conqueror or his successors. The Isle of Man and Ireland are part of the possessions of the Crown of England; yet retain their ancient laws: That in Davis, 36, it is not pretended that the custom of tanistry was determined by the conquest of Ireland, but by the new settlement made there after the conquest: That it was impossible the laws of this nation, by mere conquest, without more, should take place in a conquered country; because, for a time, there must want officers, without which our laws can have no force: That if our law did take place, yet they in Jamaica having power to make new laws, our general laws may be altered by theirs in particulars; also they held, that in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity.

Judgment *pro quer.*[1]

[1] Another report of the same case may be found in 4 Mod. 222. In that case the court is reported to have said: "And therefore it was held, that Jamaica was not governed by the laws of England after the conquest thereof, till new laws were made: for they had neither sheriff nor counties; they were only an assembly of people which are not bound by our laws, unless particularly mentioned. In Barbadoes all freeholds are subject to debts, and are esteemed as chattels till the creditors are satisfied, and then the lands descend to an heir; but the law is otherwise here; which shows that though that island is parcel of the possessions of England, yet it is not governed by the laws made here, but by their own particular laws and customs."

Acc. Earl Derby's Case, 2 And. 116; Mem. 2 P. Wms. 75. See *Cross* v. *Harrison*, 16 How. 164; *Airhart* v. *Massieu*, 98 U. S. 491. — ED.

For the effect of settlement of India on Hindoo, and the introduction of English

Emerson, J., in *First National Bank* v. *Kinner*, 1 Utah, 100 (1873). In *American Ins. Co.* v. *Canter*, 1 Pet. 511, the court, by Judge Marshall, say substantially, that the laws of Florida, as they were when the Territory was ceded, so far as not inconsistent with the Constitution and Laws of the United States, continued in force until altered by the newly created power of the State. (See, also, *United States* v. *Powers*, 11 How. 570; *Strothers* v. *Lucas*, 12 Pet. 410, 436.) This

law, see *Advocate-General* v. *Ranee Surnomoye Dossee*, 1863, 2 Moore's P. C., N. S., 22. (Beale, 67).

In considering whether and in how far the common law of England was introduced into and became a part of the law of the colonies (Massachusetts) Chief Justice Shaw says:

"We do not accede to the proposition, that the present existence and effect of the whole body of law, which existed before the Constitution, depends solely upon this provision of it. We take it to be a well-settled principle, acknowledged by all civilized states governed by law, that by means of a political revolution, by which the political organization is changed, the municipal laws, regulating their social relations, duties, and rights, are not necessarily abrogated. They remain in force, except so far as they are repealed or modified by the new sovereign authority. Indeed, the existence of this body of laws, and the social and personal rights dependent upon them, from 1776, when the Declaration of Independence was made, and our political revolution took place, to 1780, when this Constitution was adopted, depend on this principle. The clause in the Constitution, therefore, though highly proper and expedient to remove doubts, and give greater assurance to the cautious and timid, was not necessary to preserve all prior laws in force, and was rather declaratory of an existing rule, than the enactment of a new one. We think, therefore, it should have such a construction as best to carry into effect the great principle it was intended to establish.

"When our ancestors first settled this country, they came here as English subjects; they settled on the land as English territory, constituting part of the realm of England and of course governed by its laws; they accepted charters from the English government, conferring both political powers and civil privileges; and they never ceased to acknowledge themselves English subjects, and never ceased to claim the rights and privileges of English subjects, till the revolution. It is not, therefore, perhaps, so accurate to say that they established the laws of England here, as to say, that they were subject to the laws of England. When they left one portion of its territory they were alike subject on their transit and when they arrived at another portion of the English territory; and therefore always, till the Declaration of Independence, they were governed and protected by the laws of England, so far as those laws were applicable to their state and condition. Under this category must come all municipal laws regulating and securing the rights of real and personal property, of person and personal liberty, of habitation, of reputation and character, and of peace. The laws designed for the protection of reputation and character, and to prevent private quarrels, affrays, and breaches of peace, by punishing malicious libel, were as important and as applicable to the state and condition of the colonists as the law punishing violations of the rights of property, of person, or of habitation; that is, as laws for punishing larceny, assault and battery, or burglary. Being part of the common law of England, applicable to the state and condition of the colonists, they necessarily applied to all English subjects and territories, as well in America as in Great Britain, and so continued applicable till the Declaration of Independence." (*Commonwealth* v. *Chapman*, 1848, 13 Met. 68; Beale, 72–76.) — Ed.

appears to be the settled doctrine in regard to conquered and ceded Territory in the absence of special treaty stipulation. It applies to territory acquired from Mexico, since the treaty of Guadaloupe made no special provision on the subject. Utah was embraced in that acquisition. As in Florida the pre-existing law was Spanish, so in Utah, it was Mexican, and in both cases the laws were derived mainly from the laws of Rome. In neither did the English common law, or the Statute of Frauds, prevail. Congress made no special change, and the Territorial Legislature, upon whom authority was conferred, have made no express enactment upon the subject.

This Territory was first settled in 1847, and from that time up to the acquisition and treaty in 1848, the settlers were comparatively few in number. There were no settled laws, usages, and customs among them. They came here as American citizens, under the flag, and claiming the protection of the United States Government.

The particular class of persons forming the great, if not the entire bulk of emigrants, claim to have furnished troops from among their own numbers to assist this Government in its war against Mexico.

At the time of the acquisition and treaty they could not claim Mexican citizenship, and have never adopted its laws and customs.

Soon after the change of sovereignty by the treaty, emigrants in large numbers flocked in from the States and surrounding Territories, and for many years there has been an organized community.

When we turn to the communities from whence the emigrants proceeded, we find that they differed one from another, more or less, in regard to their laws and institutions. No two are alike. In the most, it is true, many common-law principles and doctrines were in force. Still, the body of the common law in each was peculiar to the particular State, and it was rather the common law of the State than the English common law. In some, the English statutes had been received as common law; in others, not.

These diversities make it impossible to assume that any specific body of the common law was transplanted to the Territory by the fact of immigration.

But one course was open, and that was for the whole body of the people to agree, expressly or tacitly, upon a common measure. It was to be expected that the emigrants would not be contented with the loose and alien institutions of an outlying Mexican department, and they have not been.

They have tacitly agreed upon maxims and principles of the common law suited to their conditions and consistent with the Constitution and laws of the United States, and they only wait recognition by the courts

to become the common law of the Territory. When so recognized, they are laws as certainly as if expressly adopted by the law-making power.

CHAPPELL v. JARDINE.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1884.

(*Reported* 51 *Connecticut*, 64.)

PARK, C. J.[1] This is a suit for the foreclosure of certain mortgaged premises, constituting an island, known as Ram Island, in Long Island Sound. The complaint alleges that the land mortgaged, at the time the deed was given, lay in the town of Southhold, Suffolk County, in the State of New York, and it is averred that the mortgage was recorded in the office of the clerk of Suffolk County in that State. It is further alleged that Ram Island, by the recent establishment of the boundary line between the State of New York and this State, has become a part of the town of Stonington in this State. The complaint is demurred to, so that the averment stands admitted that the island was, when the mortgage was made, a part of the State of New York.

We have heretofore held (*Elphick* v. *Hoffman*, 49 Conn. 331) that the boundary agreed upon by the joint commission of the two States and established by the legislative acceptance of both States, was to be regarded as presumably a designation and establishment of the pre-existing boundary line which had become lost, and not as the establishment of a new line, leaving the matter open to proof in special cases. If we should apply that rule here, and consider the island in question as having been legally a part of this State when the mortgage was made, we should at once encounter another question of a serious nature. There can be no question that whatever has been the *de jure* jurisdiction over the island, it has been for many years within the *de facto* jurisdiction of the State of New York; and we should be compelled to determine the legal effect upon this mortgage of that *de facto* jurisdiction.

We have thought it as well, therefore, to take the case as the parties have themselves presented it, the plaintiff by the averments of his complaint and the defendants by the admissions of their demurrer, and regard the island in question as having been within the State of New York when the mortgage was made, and afterwards brought within this State by the establishment of the boundary line. Indeed, as the

[1] Part of the opinion is omitted. — ED.

proceeding is in error, we cannot properly govern ourselves by anything but the record as it comes before us.

And in treating the island as within the State of New York when the mortgage was made we are regarding the contract and the right of the parties under it, precisely as they themselves understood them at the time.

The mortgaged premises having been in the State of New York when the mortgage was made, it is of course to be governed in its construction and effect by the laws of that State then in force. In *McCormick* v. *Sullivan*, 10 Wheat. 192, the court say: "It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another." The same doctrine is held in *United States* v. *Crosby*, 7 Cranch, 115, *Kerr* v. *Moon*, 9 Wheat. 565, *Darby* v. *Mayer*, 10 id. 465, and in many other cases. Indeed the doctrine is unquestioned law everywhere.

Now, according to the laws of the State of New York then and still in force, a mortgage of real estate creates a mere chose in action, a pledge, a security for the debt. It conveys no title to the property. The claim of the mortgagee is a mere chattel interest. He has no right to the possession of the property. The title and seisin remain in the mortgagor, and he can maintain trespass and ejectment against the mortgagee, if he takes possession of the property without the consent of the mortgagor. This appears clearly from the following cases.[1]

It follows, therefore, that while the land in question remained in the State of New York, it was incumbered by a mortgage of this character; and when it came into this State it bore with it the same burden precisely. There was nothing in the change of jurisdiction that could affect the contract of mortgage that had been made between the parties. The title to the property continued to remain in the mortgagor, and it remains in him still. This is clear. The laws of this State could not make a new contract for the parties or add to one already made. They had to take the contract as they found it.

Now, it is clear that there is no remedy by way of foreclosure known to our law which is adapted or appropriate to giving relief on a mortgage of this character. Our remedy is adapted to a mortgage deed which conveys the title of the property to the mortgagee, and when the law day has passed, the forfeiture, stated in the deed, becomes absolute

[1] The learned judge here cited and discussed the following cases: *Gardner* v. *Heartt*, 3 Den. 232; *Power* v. *Lester*, 23 N. Y. 527; *Timm* v. *Marsh*, 54 N. Y. 599; *Jackson* v. *Willard*, 4 Johns. 42; *Astor* v. *Hoyt*, 5 Wend. 603; *Kortright* v. *Cady*, 21 N. Y. 343; *Merritt* v. *Bartholick*, 36 N. Y. 44. — Ed.

at law, and vests a full and complete title in the mortgagee, with the exception of the equitable right of redemption, which still remains in the mortgagor. The object of the decree of foreclosure is, to extinguish this right of redemption if the mortgage debt is not paid by a specified time. The decree acts upon this right only. It conveys nothing to and decrees nothing in the mortgage if the debt is not paid. After the law day has passed the right of redemption becomes a mere cloud on the title the mortgagee then has, and when it is removed his title becomes clear and perfect. *Phelps* v. *Sage*, 2 Day, 151; *Roath* v. *Smith*, 5 Conn. 136; *Chamberlin* v. *Thompson*, 10 id. 244; *Porter* v. *Seeley*, 13 id., 564; *Smith* v. *Vincent*, 12 id., 1; *Doton* v. *Russell*, 17 id. 151; *Cross* v. *Robinson*, 21 id. 379; *Dudley* v. *Caldwell*, 19 id. 218; *Colwell* v. *Warner*, 36 id. 224.

What effect would such a decree produce upon a mortgage like the one under consideration, where the legal title remains in the mortgagor, and nothing but a pledgee's interest is in the mortgagee, even after the debt becomes due? It could only extinguish the right of redemption, if it could do that. It could not give the mortgagee the right of possession of the property, for the mortgagor has still the legal title, which carries with it the right of possession. It would require another proceeding in equity, to say the least, to dispossess him of that title, and vest it in the mortgagee. Hence it is clear that full redress cannot be given the plaintiff in this proceeding.

But the plaintiff has a lien on the property in the nature of a pledge to secure payment of the mortgage debt. And although our remedy of strict foreclosure may not be adapted to give redress to the plaintiff through the medium of such a lien, still a court of equity can devise a mode that will be appropriate; for it would be strange if a lawful lien upon property to secure a debt could not be enforced according to its tenor by a court of chancery. It is said that every wrong has its remedy; so it may be said that every case requiring equitable relief has its corresponding mode of redress. We have no doubt that a court of equity has the power to subject the property in question to the payment of this debt, upon a proper complaint adapted to the purpose. When personal property is pledged to secure the payment of a debt, it may be taken and sold, that payment may be made, after giving the pledgor a reasonable opportunity for redemption. So here, we think a similar course might be taken with this property. Such a course would fall in with the original intent of the parties, and with the civil code and mode of procedure of the State of New York. Modes of redress in that State have of course no force in this State, but such a mode of procedure seems to be adapted to a case of this character.

And we further think that on an amended complaint, setting forth

all the essential facts, and praying that if there shall be a default in redeeming the property during such time as the court shall allow for redemption, then the right of redemption shall be forever foreclosed, and the legal title and possession of the property be decreed in the mortgage, such course might be taken.

We think either of the modes suggested might be pursued; but inasmuch as the course which has been taken leaves the legal title and possession of the property in the mortgagor, we think the court erred in holding the complaint sufficient, and in passing the decree thereon.

There is error in the judgment appealed from, and it is reversed, and the case remanded.

In this opinion the other judges concurred.

MORTIMER v. NEW YORK ELEVATED RAILROAD CO.

SUPERIOR COURT OF THE CITY OF NEW YORK, 1889.

(*Reported* 6 *New York Supplement*, 898.)

FREEDMAN, J. The claim made in this case by and on behalf of the elevated railway companies is that the absolute fee of the street known as the "Bowery" was, prior to the surrender of the Dutch forces to the English in 1664, in the Dutch government; that such fee thereafter went to the State or to the city of New York so absolutely that abutting owners never had, and do not now have, any easement of any kind in said street, and that, the elevated railway running through the Bowery having been constructed with the consent of both the city and the State, neither its owners nor its lessees are liable for any injury inflicted upon abutting property by reason of the construction and operation of the railway.

The claim of the English that they were the owners, by right of discovery, under governmental authority, of the land of which the present city of New York forms a part, and that this gave them such exclusive ownership that the Dutch government acquired no title to the land which can be recognized, has been fully set forth in the opinion of Judge Truax. I concur in his remarks as far as they go, but wish to add the following, viz.: —

The claim of the English, it is true, has occasionally been criticised on the ground that neither of the Cabots landed in or near New York, or saw the coast of New York. The right of discovery is not recognized in the Roman law unless followed by occupation, or unless the intention of the sovereign or State to take possession be declared or made known to the world. And it must be conceded that modern

diplomatists and publicists incline to the opinion that mere transient discovery amounts to nothing unless followed in a reasonable time by occupation and settlement, more or less permanent, under the sanction of the State. But the question in the case at bar is not to be decided according to the rules of the international law of the present time. It is a question purely between the public authorities of the State of New York and citizens of the same State, and as such it is controlled by the decisions referred to by Judge TRUAX, to the effect that what the English did do was sufficient to give them title by discovery, and that such title is superior to the Indian title. These decisions proceeded upon the theory that the claim of the Dutch was contested by the English from the very start, not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title; and that the claim of the English was finally decided in their favor by the sword. That being so, it follows that, in contemplation of present law, neither the Dutch nor the Roman law ever prevailed in the State of New York *de jure* and that the common law of England must be deemed to be the original source of all our law. And it further follows that the foundations of the rights of owners of land abutting on a street laid out while the Dutch were in possession, as against the city or the State of New York, rest upon the English common law, and that they are not to be affected by the Dutch or Roman law.

Reported cases in which the validity of Dutch grants was upheld between individuals have no application to the present controversy. Now, under the English common law, the presumption is that the owners of lands lying on a highway are the owners of the fee of the highway; that the owners on each side of the highway own the soil of the highway in fee to the centre of the highway; and that the rights of the public in and to the highway are no higher or other than those of a mere easement. *Wager* v. *Railroad Co.*, 25 N. Y. 529. This presumption applies as well to the streets of a city as to a country highway. *Bissell* v. *Railroad Co.*, 23 N. Y. 61. This presumption of law is founded on the supposition that the way was originally granted by the adjoining owners in equal proportions. *Watrous* v. *Southworth*, 5 Conn. 305. But the presumption may be rebutted by proof to the contrary, and it is rebutted by the production of a deed under which the owner derives title granting the land to the side of the street only. Under the operation of this rule, and there being no proof of alienation or escheat requiring a different conclusion, it must be assumed in this case that the original grantors from whom plaintiffs' title has been derived owned the soil of the Bowery in front of the premises in suit to the centre of the street. But even if the title of

the English rested not in discovery, but in conquest, and the English, upon the surrender by the Dutch in 1664, acquired from the Dutch a title to the then existing streets as absolute as under the Roman law the title of the government to a military highway was, the fact would not improve the position of the defendants. Upon receiving such title the English could do with it what they pleased. They were not bound to enforce it against abutting owners, as the Dutch government might have enforced it. The presumption is that they took the title and the streets to be held by them according to their own laws, and as matter of fact they thereafter so dealt with said streets as to admit of no other conclusion. The province having been granted by Charles II. to his brother, the Duke of York, by the charter of 1664, several months before the surrender to Sir Richard Nicolls, the grant, in order to remove all doubt as to its validity, was afterwards confirmed by the charter of 1674, also granted to the Duke of York. The object of both charters was to enable the Duke of York to plant a colony on this continent. The charter of 1664, issued under the great seal of England, contained a provision that the statutes, ordinances, &c., to be established by the Duke in the new country, "should not be contrary to, but as nearly as might be agreeable to, the laws, statutes, and government of the realm of England." This charter was, therefore, in itself, an explicit declaration of the King's will that the laws of England should be established in the colony, and that the laws of the Dutch settlers should not be retained. The consequence was that, having obtained the lands, the English held them, not under the Dutch or the civil law, but under the common law of their own country. English law governed English land, so that, even if an absolute title to a street was obtained, the street was ever thereafter treated as an English street, under the common law.[1]

[1] The learned judge then expressed the opinion that by subsequent acts of the Proprietor and of the State the city lost its rights, if any, to the legal fee.

In his concurring opinion TRUAX, J., said: "I am of the opinion that the fee of the Bowery, and of the other streets in the city of New York that are known as Dutch streets, never was in the Dutch government; and that it was, prior to the Revolution, bound by the rules of the common law, and not by the rules of the Dutch civil law. While the Dutch were in actual possession this execution of the common law was suspended, just as, during the late rebellion, this execution of the laws of the United States could not be enforced in some of the Southern States. But, said the Supreme Court of the United States in *Ketchum* v. *Buckley*, 99 U. S., 188, "the same general form of government, the same general law for the administration of justice, and the protection of private rights which had existed in the States prior to the rebellion, remained during its continuance and afterwards."

See *Ketchum* v. *Buckley*, 90 U. S. 188, and cases cited. — ED.

McKENNON v. WINN.

SUPREME COURT OF OKLAHOMA TERRITORY, 1893.

(*Reported* 1 *Oklahoma Reports*, 327.)

BURFORD, J.[1] The appellant filed his complaint in the court below to enforce the specific performance of a contract for the conveyance of real estate situated in Oklahoma City, Oklahoma County, Oklahoma Territory. A demurrer was filed to the complaint, alleging as grounds: First. That the court has no jurisdiction of the person of defendant, or the subject of the action. Second. That the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained, to which the appellant excepted and brings the case to this court by appeal. * * *

The second ground for demurrer presents two questions: First. Can a parol contract for the conveyance of real estate, or an interest therein, made after the settlement of this country, and prior to the adoption of our organic act, be enforced? Second. Is a contract for the conveyance of real estate, entered into before title is acquired from the United States, and to be executed after title is acquired, void, as against public policy?

The first proposition seems to be settled by the adjudicated cases and text writers in favor of the appellant. "Every contract, on whatever subject, may be in oral words, which will have the same effect as if written, except when some positive rule of the common or statutory law has provided otherwise." Bish. Cont. sect. 153; *Mallory* v. *Gillett*, 21 N. Y. 412; *Wyman* v. *Goodrich*, 26 Wis. 21; *Green* v. *Brookins*, 23 Mich. 48; *White* v. *Maynard*, 111 Mass. 250. By the common law, prior to the enactment of the Statute of Frauds (29 Car. II., c. 3, A. D. 1676), contracts for the sale of real estate, or an interest therein, were not required to be in writing. Bish. Cont., sect. 1231; 4 Kent Com., p. 450. The English-speaking people brought the common law to America with them, in the first settlement of the colonies; and it has prevailed in all the States and Territories, modified by legislative acts, local conditions, and such of the English statutes adopted prior to the settlement of our colonies as were of general application, and suited to our conditions, except in some portions where the French or civil law prevailed. At the time of the settlement and discovery of America the Statute of Frauds had

[1] Part of the opinion is omitted. — ED.

not been adopted, and has only become the law of the United States, or of our several States and Territories, by legislative enactment.

This leads us to the inquiry, Did the common law prevail in the Territory in April, 1889? It is contended that prior to the settlement of Oklahoma, and until the same was superseded by statutory laws, the Code Napoleon, or civil law, prevailed. Whatever may have been the laws of the country now known as Oklahoma, they ceased to operate in the region originally comprising the Indian Territory when the Territory ceased to be a part of the Territory of Louisiana, and the laws of the Territory of Indiana and the Territory of Missouri, which may have once prevailed in said region, became inoperative in and ceased to have any force or effect in the Indian Territory, when that Territory ceased to be a part of said Territories. *Railroad Co.* v. *O'Loughlin*, 49 Fed. Rep. 440. There was no law in the Indian Territory regulating the making of contracts at the time of the approval of the act of Congress establishing a United States district court in said Territory by the act of March 1, 1889. 25 Stat. 783. Congress, with the assent of the Indians, created the court for the whole of the Indian Territory, which included Oklahoma, and conferred on it jurisdiction in all civil cases between citizens of the United States who are residents of the Territory, or between citizens of the United States or of any State or Territory, and any citizen of, or person residing or found in, the Indian Territory. It gave the court authority, and imposed upon it the duty, to apply the established rules and principles of the common law to the adjudication of those cases of which it was given jurisdiction. *Pyeatt* v. *Powell*, 51 Fed. Rep. 551. But if it be held that the establishment of a United States court in the Indian Territory did not put the common law in force in said Territory, except in so far as was necessary to execute the powers of said court, and for the adjudication of such cases as actually went into that forum, then there was no law in Oklahoma, at the date of its settlement, regulating the making of contracts. If this should be conceded, then it necessarily follows, on principle, that when people from all parts of the United States, on the 22d day of April, 1889, settled the country known as Oklahoma, built cities, towns, and villages, and began to carry on trade and commerce in all its various branches, they brought into Oklahoma, with them, the established principles and rules of the common law, as recognized and promulgated by the American courts, and as it existed when imported into this country by our early settlers, and unmodified by American or English statutes. So that, in any event, the common law prevailed in Oklahoma at the time the contract between the appellant and appellee was entered into; and as, at common law, con-

tracts for the sale and conveyance of real estate were not required to be in writing, the contract mentioned in the complaint may be enforced, unless void for other reasons.[1]

SECTION 6. — TERRITORIAL WATERS OF A STATE.

(*a*) *Rivers.*[2]

HANDLY'S LESSEE v. ANTHONY.

SUPREME COURT OF THE UNITED STATES, 1820.

(5 *Wheaton*, 374.)

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court. This was an ejectment brought in the Circuit Court of the United States for the District of Kentucky, to recover land which the plaintiff claims under a grant from the State of Kentucky, and which the defendants hold under a grant from the United States as being part of Indiana. The title depends upon the question whether the lands lie in the State of Kentucky, or in the State of Indiana.

At this place, as appears from the plat and surveyor's certificate, the Ohio turns its course, and runs southward for a considerable distance, and then takes a northern direction, until it approaches within less than three miles, as appears from the plat, of the place where its southern course commences. A small distance above the narrowest part of the neck of land which is thus formed, a channel, or what is commonly termed in that country a bayou, makes out of the Ohio, and enters the same river a small distance below the place where it resumes its westward course. This channel, or bayou, is about nine miles by its meanders, three miles and a half in a straight line, and from four to five poles wide. The circuit made by the river appears to be from fifteen to twenty miles. About midway of the channel two branches empty into it from the northwest, between six and seven hundred yards from each other; the one of

[1] The contract was held not to be void on the ground alleged; the court followed on this point *Lamb* v. *Davenport*, 18 Wall. 307. — ED.

[2] As previously said, *ante*, p. 84, note, the cases cited in *U. S.* v. *Texas*, *ante*, 76, are the leading authorities in the United States on this subject. They are, however, too long to print, and the decision of *Handly* v. *Anthony* is supplemented by two State cases, which, although less known, correctly state the law.—ED.

which runs along the channel at low water, eastward, and the other westward, until they both enter the main river. Between them is ground over which the waters of the Ohio do not pass until the river has risen about ten feet above its lowest state. It rises from forty to fifty feet, and all the testimony proves that this channel is made by the waters of the river, not of the creeks which empty into it. The people who inhabit this peninsula, or island, have always paid taxes to Indiana, voted in Indiana, and been considered as within its jurisdiction, both while it was a Territory, and since it has become a State. The jurisdiction of Kentucky has never been extended over them.

The question whether the lands in controversy lie within the State of Kentucky or of Indiana, depends chiefly on the land law of Virginia, and on the cession made by that State to the United States.

Both Kentucky and Indiana were supposed to be comprehended within the charter of Virginia at the commencement of the war of our revolution. At an early period of that war, the question whether the immense tracts of unsettled country which lay within the charters of particular States, ought to be considered as the property of those States, or as an acquisition made by the arms of all, for the benefit of all, convulsed our confederacy, and threatened its existence. It was probably with a view to this question that Virginia, in 1779, when she opened her land office, prohibited the location or entry of any land "on the northwest side of the river Ohio."

In September, 1780, Congress passed a resolution, recommending "to the several States having claims to waste and unappropriated lands in the western country, a liberal cession to the United States, of a portion of their respective claims, for the common benefit of the Union." And in January, 1781, the Commonwealth of Virginia yielded to the United States "all right, title, and claim, which the said Commonwealth had to the territory northwest of the river Ohio, subject to the conditions annexed to the said act of cession." One of these conditions is, "that the ceded territory shall be laid out and formed into States." Congress accepted this cession, but proposed some small variation in the conditions, which was acceded to; and in 1783 Virginia passed her act of confirmation, giving authority to her members in Congress to execute a deed of conveyance.

It was intended then by Virginia, when she made this cession to the United States, and most probably when she opened her land office, that the great river Ohio should constitute a boundary between the States which might be formed on its opposite banks. This intention ought never to be disregarded in construing this cession.

The two exceptions present substantially the same questions to the

court, and may therefore be considered together. They are, whether land is properly denominated an island of the Ohio, unless it be surrounded with the water of the river, when low? and whether Kentucky was bounded on the west and northwest by the low water mark of the river, or at its middle state? or, in other words, whether the State of Indiana extends to low-water mark, or stops at the line reached by the river when at its medium height?

In pursuing this inquiry, we must recollect that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory "situate, lying, and being to the northwest of the river Ohio." And this territory, according to express stipulation, is to be laid off into independent States. These States, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country.

When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly created State extends to the river only. The river, however, is its boundary.

"In case of doubt," says Vattel, "every country lying upon a river, is presumed to have no other limits but the river itself; because nothing is more natural than to take a river for a boundary, when a state is established on its border; and wherever there is a doubt, that is always to be presumed which is most natural and most probable.

"If," says the same author, "the country which borders on a river, has no other limits than the river itself, it is in the number of territories that have natural or indetermined limits, and it enjoys the right of alluvion."

Any gradual accretion of land, then, on the Indiana side of the Ohio, would belong to Indiana, and it is not very easy to distinguish between land thus formed, and land formed by the receding of the water.

If, instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted that a country bounded by the river would extend to low-water mark. This rule has been established by the common consent of mankind. It is founded on common convenience. Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would

be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling is annual, than where it is diurnal. Wherever the river is a boundary between States, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark.

When the State of Virginia made the Ohio the boundary of States, she must have intended the great river Ohio, not a narrow bayou into which its waters occasionally run. All the inconvenience which would result from attaching a narrow strip of country lying on the northwest side of that noble river to the States on its southeastern side, would result from attaching to Kentucky, the State on its southeastern border, a body of land lying northwest of the real river, and divided from the mainland only by a narrow channel, through the whole of which the waters of the river do not pass, until they rise ten feet above the low-water mark.

The opinions given by the court must be considered in reference to the case in which they were given. The sole question in the cause respected the boundary of Kentucky and Indiana; and the title depended entirely upon that question. The definition of an island which the court was requested to give, was either an abstract proposition, which it was unnecessary to answer, or one which was to be answered according to its bearing on the facts in the cause. The definition of an island was only material so far as that definition might aid in fixing the boundary of Kentucky. In the opinion given by the court on the motion made by the counsel for the defendants, they say that "no land can be called an island of the Ohio, unless it be surrounded by the waters of that river at low-water mark." We are not satisfied that this definition is incorrect, as respected the subject before the court; but it is rendered unimportant, by the subsequent member of the sentence, in which they say, "that to low-water mark only, on the western and northwestern side of the Ohio, does the State of Kentucky extend."

So, in the motion made by the counsel for the plaintiff, the court was requested to say, that if the waters of the Ohio flowed in the channel, in its middle and usual state, it was not only an island, but "within the State of Kentucky."

If the land was not within the State of Kentucky, the court could not give the direction which was requested. The court gave an instruction substantially the same with that which had been given on the motion of the defendant's counsel.

If it be true, that the river Ohio, not its ordinary bank, is the boundary of Indiana, the limits of that State can be determined only by the river itself. The same tract of land cannot be sometimes in Kentucky, and sometimes in Indiana, according to the rise and fall of the river. It must be always in the one State, or the other.

There would be little difficulty in deciding, that in any case other than land which was sometimes an island, the State of Indiana would extend to low-water mark. Is there any safe and secure principle, on which we can apply a different rule to land which is sometimes, though not always, surrounded by water?

So far as respects the great purposes for which the river was taken as the boundary, the two cases seem to be within the same reason, and to require the same rule. It would be as inconvenient to the people inhabiting this neck of land, separated from Indiana only by a bayou or ravine, sometimes dry for six or seven hundred yards of its extent, but separated from Kentucky by the great river Ohio, to form a part of the last-mentioned State, as it would for the inhabitants of a strip of land along the whole extent of the Ohio, to form a part of the State on the opposite shore. Neither the one nor the other can be considered as intended by the deed of cession.

If a river, subject to tides, constituted the boundary of a State, and at flood the waters of the river flowed through a narrow channel, round an extensive body of land, but receded from that channel at ebb, so as to leave the land it surrounded at high water, connected with the main body of the country; this portion of territory would scarcely be considered as belonging to the State on the opposite side of the river, although that State should have the property of the river. The principle that a country bounded by a river extends to low-water mark, a principle so natural, and of such obvious convenience as to have been generally adopted, would, we think, apply to that case. We perceive no sufficient reason why it should not apply to this.

The case is certainly not without its difficulties; but in great questions which concern the boundaries of States, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals. The State of Virginia intended to make the great river Ohio, throughout its extent, the boundary between the territory ceded to the United States and herself. When that part of Virginia, which is now Kentucky, became a separate State, the river was the boundary between the new States erected by Con-

gress in the ceded territory, and Kentucky. Those principles and considerations which produced the boundary, ought to preserve it. They seem to us to require, that Kentucky should not pass the main river, and possess herself of lands lying on the opposite side, although they should, for a considerable portion of the year, be surrounded by the waters of the river flowing into a narrow channel.

It is a fact of no inconsiderable importance in this case, that the inhabitants of this land have uniformly considered themselves, and have been uniformly considered, both by Kentucky and Indiana, as belonging to the last-mentioned State. No diversity of opinion appears to have existed on this point. The water on the northwestern side of the land in controversy, seems not to have been spoken of as a part of the river, but as a bayou. The people of the vicinage, who viewed the river in all its changes, seem not to have considered this land as being an island of the Ohio, and as a part of Kentucky, but as lying on the northwestern side of the Ohio, and being a part of Indiana.

The compact with Virginia, under which Kentucky became a State, stipulates, that the navigation of, and jurisdiction over, the river, shall be concurrent between the new States, and the States which may possess the opposite *shores* of the said river. This term seems to be a repetition of the idea under which the cession was made. The shores of a river border on the water's edge.

Judgment affirmed, with costs.

WILLIAM BUTTENUTH *et al.* v. THE ST. LOUIS BRIDGE COMPANY.

SUPREME COURT OF ILLINOIS, 1888.

(123 *Illinois*, 535.)

Mr. Justice SCOTT delivered the opinion of the court. * * *

The remaining ground of relief insisted upon is, that part of the bridge structure which lies west of its easternmost pier is outside of the State of Illinois, and was illegally assessed and included in the assessment with that part which is confessedly within the limits of the State. On this branch of the case some evidence was offered, and some discussion has been had as to the boundary line between the States of Missouri and Illinois at the point where the bridge structure spans the Mississippi River. That question is certainly one of great gravity, and one this court will hardly undertake to determine definitely on the meagre evidence to be found in this record, and in

a case where neither State is represented, and where there are no defendants other than private citizens, neither of whom had the slightest *personal* interest in the matter. The utmost this court will assume to decide is, what part of complainant's bridge is to be regarded as within the State of Illinois for the purposes of taxation, or, what is the same thing, does the valuation of complainant's property, as made by the assessor for 1885, include any portion of the bridge not subject to taxation in this State.

It is certain no part of that portion of the bridge structure assessed by the local assessor for taxation in this State is in the State of Missouri, nor does it appear that it was ever subject to taxation in that State. In the act of Congress, March 6, 1820 (U. S. Stat. at Large, p. 545), to enable the territory of Missouri to form a constitution, in fixing the boundaries it is declared, "thence due east to the middle of the main channel of the Mississippi River, thence down and following the course of the Mississippi River, in the middle of the main channel thereof." The State of Missouri, by its constitution of 1820, ratified the boundaries as fixed by the enabling act of Congress, and there can be no pretence the eastern boundary of the State has since been changed. The constitution of 1875, of that State, simply ratified and confirmed the boundaries of the State as established by law. Notwithstanding the fact the main channel of the river might be changed by imperceptible natural wear on one side, or by gradual formation of alluvions, still "the middle of the main channel," when ascertained, would be the boundary of the State. It might be a slightly shifting line, hardly perceptible; still it would be a well-known and easily ascertainable boundary line. The rule of law is, when a stream dividing co-terminous States, being a boundary line, alters its channel by a gradual or imperceptible process of wear or of alluvions, the boundary shifts with the channel. No matter what conclusion might be reached as to the western boundary of Illinois, it cannot be maintained the eastern boundary of the State of Missouri is farther east than the "middle of the main channel" of the Mississippi at the point where the bridge structure spans that river. It is not alleged in the bill, nor claimed in argument, any portion of the bridge assessed by the local assessor in this State lies west of the "middle of the main channel" of the river. It would seem to follow, therefore, if that portion of the bridge included in the assessment that lies between the eastern pier of the bridge and the "middle of the main channel" of the river, is not within the limits of the State of Illinois, it is not included within the defined boundaries of either State. That conclusion will hardly be adopted, unless the question will admit of no other solution.

The act of Congress of April 18, 1818, to enable the people of the Territory of Illinois to form a State constitution, fixed the western boundary at the "middle of the Mississippi River," and declared the State should have concurrent "jurisdiction on the Mississippi River with any State or States to be formed west thereof, so far as said river shall form a common boundary to both." By the constitution of 1818, the people ratified the boundaries fixed for the State by the enabling act of Congress, and in the constitutions of 1848 and of 1870 the same boundaries and jurisdiction are declared, except in the two last constitutions it is provided "this State shall exercise such jurisdiction upon the Ohio River as she is now entitled to, or such as may be agreed upon by this State and the State of Kentucky." It seems clear, from all legislation and ordinances on this subject, it was intended the Mississippi River should constitute "a common boundary" between the State of Illinois and any State or States that might be formed to the west and next to that river. That intention is more definitely declared than it was in regard to the Ohio River, for in fixing the boundary of Illinois, when the line down along the middle of the Mississippi River should reach the confluence of that river with the Ohio, the boundary should be from thence up the latter river "along its northwestern shore," and yet it has been held the river is the boundary between States divided by the Ohio River, although the original proprietor, in granting the territory, retained the river within its own domain. The law, as stated by law writers, and in the adjudged cases, seems to be, that where a river is declared to be the boundary between States, although it may change imperceptibly, from natural causes, the river, "as it runs, continues to be the boundary." But if the river should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river bed. Where a river is a boundary between States, as is the Mississippi between Illinois and Missouri, it is the main — the permanent — river which constitutes the boundary, and not that part which flows in seasons of high water, and is dry at other times. (*Handly's Lessee* v. *Anthony*, 5 Wheat. 174.) In no other way would a river be a permanent fixed boundary, at all times readily ascertainable. There are many cogent reasons why the boundary lines between States should be permanent, otherwise territory in one State at one time, sooner or later might be in another State. It must be in one State all the time, or else the State would lose jurisdiction over it.

Treating, then, as must be done, the Mississippi River as a common boundary between the States of Illinois and Missouri, what meaning is to be given to the term, "middle of the Mississippi River," used

in the enabling act of Congress and in the constitution, defining the boundaries of the State of Illinois? Whether, when mere private rights are involved, the phrases the "middle of the river," and the "middle of the main channel," or, what is the same thing, the "thread of the stream," mean the same thing, and may be interchangeably used, there are many considerations affecting the public welfare why it should be held the "middle of the channel" of a river between independent States or countries should be regarded as the boundary line between them, in the absence of express agreement to the contrary. When applied to rivers as boundaries between States, the phrases, "middle of the river," "and middle of the main channel," are equivalent expressions, and both mean the centre line of the main channel, — or, as it is most frequently expressed, the "thread of the stream." Should the expression, "middle of the river," be construed to mean a line midway of the water surface, that would give no permanent boundary that could be ascertained. It would be at one point at one time, and distant away at another. Had the boundaries of Illinois been fixed at the time of the high water in 1844, and the middle of the river opposite St. Louis be held to be a line midway of the surface of the water, that line would then have been far east of the present city of East St. Louis, and on the waters receding, it would have shifted back towards the west, nearer the city of St. Louis. So unsatisfactory a proposition as that will not be adopted. It would lead to insurmountable difficulties. Some light will be cast upon the subject of inquiry by first ascertaining, as near as may be, the meaning of the words, "main channel," "mid-channel," "middle of the current," as those terms are used in the adjudged cases and in the text-books that shall be examined.

The definition of the word "channel," given in the most recent edition of Webster's Dictionary, is, "the bed of a stream of water; especially the deeper part of a river or bay where the main current flows." The case of *Dunleith and Dubuque Bridge Co.* v. *County of Dubuque*, 55 Iowa, 558, while this court does not approve the decision of the case, contains a very accurate definition of the word "channel," as commonly used by river men. It is "the word channel, when employed in treating subjects connected with the navigation of rivers, indicates the line of the deep water which vessels follow." In *Rowe* v. *Smith*, 51 Conn. 266, it is said, "the expression, 'middle of the channel of the bay or harbor,' does not refer to the thread of deepest water, but to that space within which ships can and usually do pass." It is apprehended it is in this sense the expressions, "middle of the river," "middle of the main channel," "mid-channel," "middle thread of the channel," are used in enabling acts of Congress

and in State constitutions establishing State boundaries. It is the free navigation of the river, — when such river constitutes a common boundary, that part on which boats can and do pass, sometimes called "nature's pathway," — that States demand shall be secured to them. When a river, navigable in fact, is taken or agreed upon as the boundary between two nations or States, the utility of the main channel, or, what is the same thing, the navigable part of the river, is too great to admit a supposition that either State intended to surrender to the State or nation occupying the opposite shore, the whole of the principal channel or highway for vessels, and thus debar its own vessels the right of passing to and fro for purposes of defence or commerce. That would be to surrender all, or at least the most valuable part, of such river boundary, for the purposes of commerce or other purposes deemed of great value, to independent States or nations.

Construing, then, the phrases, "middle of the Mississippi River," and the "middle of the main channel of the Mississippi River," to mean the same thing, both acts of Congress fixing the boundaries of Illinois and Missouri declare the middle of the main channel of the Mississippi River to be the boundary line between the States, and that is the thread of the main stream.

In *Thomas* v. *Hatch*, 3 Sumner, 170, Story, J., said: "I consider the law to be clearly settled that a boundary on a stream, on or by a stream, or to a stream, includes the flats, at least to low-water mark, and in many cases to the middle thread of the river."

A valuable case on this subject is *Morgan* v. *Reading*, 3 Sm. & Marsh. 366. The opinion is by Chief Justice Sharkey. Although not directly involved, the discussion, in part, had relation to the boundary line of the State of Mississippi. The facts as stated in the opinion are, that by various treaties and cessions the United States had succeeded to all the territory east of a line drawn along the middle of the Mississippi, above the 31st degree of latitude. Louisiana was then bounded on the east by the same line, — the middle of the river above the river Iberville, as it had been established by the treaty of 1763. In 1798, while the middle of the river was still the boundary line between the province of Louisiana and the United States, Congress established the Mississippi territory, bounding it on the west by the Mississippi. It was in reference to that line the court said, "we have said that Congress omitted to mention the middle of the river, but bounded the territory by the Mississippi." The common law, by construction, extends grants bounded "by" or "on" or "along" a fresh water stream, to the thread of the stream. The Mississippi territory, by this rule, extended to the middle of the river.

In *Handly's Lessee* v. *Anthony, supra*, it was said by the court: "Where a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream."

Mr. Field, in his work entitled "Outlines of an International Code," (2d ed.) section 30, in speaking of boundary by stream or channel, says: "The limits of national territory bounded by a river or stream, or by a strait or sound, or arm of the sea, the other shore of which is the territory of another nation, extend outward to a point equidistant from the territory of the nation occupying the opposite shore, or, if there be a stream or a navigable channel, to the thread of the stream, — that is, to the mid-channel, — or, if there be several channels, to the middle of the principal one."

In his work on the "Law of Nations," p. 31, Mr. Polson says: "If the river divides two States, the mid-channel is considered as the boundary line, unless prior occupation has given to the one or the other the right of possession to the whole."

There are cases in this and other courts, although the discussion had reference directly to riparian rights, and not to boundaries between States, that illustrate this same doctrine. In *Fletcher* v. *Thunder Bay Boom Co.*, 51 Mich. 277, it was held, the riparian rights of defendant in the case being considered, extended to the thread of the stream — to the centre of the main channel of the river. It was said by this court in *Middleton* v. *Pritchard*, 3 Scam. 510, "that all grants bounded upon a river not navigable by the common law, entitled the grantee to all islands lying between the mainland and the centre thread of the current." In *Cobb* v. *Lavalle*, 89 Ill. 331, it was said: "It seems to be the settled law of this country, that the owner of land bordering upon a river not navigable at common law, such as the Mississippi River, will be entitled to claim to the centre of the current of the stream." The same doctrine was re-stated in *Piper* v. *Connelly*, 108 Ill. 646, where it was said: "The general doctrine that grants of land bounded upon rivers, or the margins above tide water, carry the exclusive right and title of the grantee to the centre thread of the current, unless the terms of the grant clearly denote the intention to stop at the margin of the river, has been too long established and too firmly adhered to by this court to be now questioned."

No reason is perceived why the principles here stated should not control the decision of the case being considered. As before remarked, it is manifest it was the intention of Congress the Mississippi River should constitute a "common boundary" between the States of Illinois and Missouri, and had the words the "middle of

the Mississippi River," and the "middle of the main channel," been omitted in both enabling acts of Congress, still the river itself would be the boundary, and each State would hold to the "middle of the stream," — that is to say, the middle thread of the stream. The intention in this respect is made most manifest by the fact it must have been and was known to Congress when it passed the enabling act for Missouri, and fixed the boundary at the "middle of the main channel of the Mississippi River," that the western boundary of Illinois had been fixed "at the middle of the Mississippi River," and certainly it was not intended to fix two distinct or different boundary lines. That would have left a space not in either State, and no such absurd intention should be imputed to Congress. It was most appropriately said by the court in *Morgan* v. *Reading*, *supra*, in respect to the boundary line as fixed by the act of Congress organizing the territory of Mississippi, which established the "Mississippi River" as the western boundary: "All west of that line," — that is, the middle of the river, — "was owned by a foreign power, and we cannot suppose Congress, under the circumstances, designed to limit the jurisdiction of the territory by the bank of the river."

The suggestion, Congress, by its enabling acts, may have established one line in the Mississippi River for the eastern boundary for Missouri, and another line, farther east, for the western boundary of Illinois, has nothing, in law or in fact, upon which to rest. The whole legislation on this subject shows, as before remarked, it was the intention of Congress to make the river a "common boundary" between these States, and the expressions used in both enabling acts, although the words used may not be the same, make the middle of the main channel of the permanent river the boundary line. In such cases the principle is as stated by Mr. Woolsey, in his work on International Law, section 58: "Where a navigable river forms the boundary between States, both are presumed to have free use of it, and the dividing line will run in the middle of the channel, unless the contrary is shown by long occupancy or agreement of parties." Commercial considerations make it imperative, where States or nations are divided by a navigable river, each should hold to the centre thread of the main channel or current along which vessels in the carrying trade pass. That is the "channel of commerce," — not the shallow water of the stream, which, at some seasons of the year, may be impossible of navigation, — upon which each nation or State demands the right to move its products without any interference from the State or nation occupying the opposite shore. So important has this right ever been deemed, it is thought to be embraced in all treaties, cessions, ordinances, statutes and constitutions made, enacted or

adopted in regard to the Mississippi River since the Federal Government was organized. It was the great desire to secure this important privilege that gave rise to all the efforts on the part of the general Government to obtain the control of the Mississippi River from its source to that point where it empties into the gulf and connects with the sea.

It has been often ruled, the intention in such great matters as State boundaries, when clearly manifested by cessions, grants or legislative acts, should control. It is a fact so well known it is not called in question, that so far back as can be known, either from history or tradition, the main channel of the Mississippi River at the point where complainant's bridge is constructed, was always west of Bloody Island, — that is, between that island and the Missouri shore. Both States have always recognized this fact, and for that reason "Bloody Island," although the river east of it was, in fact, at one time, navigable for shallow-draft vessels, — certainly in seasons of high water, — was always regarded as being within the limits of the State of Illinois. At one time grave apprehensions were entertained that the main channel of the river might change to the east side of "Bloody Island," and thus leave the Missouri side; but by the consent of Illinois, expressed by the General Assembly, dykes and other structures were erected at the upper end of the island to keep the main channel on the Missouri side, where it had previously been. Those structures proved efficient, and the main channel of the river now flows where it did since before the boundaries of either State divided by it were established by Congress or declared by State constitutions. It is not claimed, either by the bill or in the evidence, that any part of complainant's bridge that was assessed by the local assessor lies west of the middle of what has always been the main channel of the river since the States were organized under the acts of Congress, and this court has no hesitation in coming to the conclusion that all of that part of the bridge, with its approaches, that lies east of the middle line of the main channel of the river, is within the jurisdiction of the State of Illinois, for the purposes of State and local taxation. Only that part of the bridge east of the middle of the main channel of the river, as appears from the plat used in making the assessment, was assessed in this case, and that was warranted by law.

The case of *Missouri* v. *Kentucky*, 11 Wall. 395, cited by counsel for complainant as being conclusive of the case in hand, has been examined, and it is not perceived it contains anything in conflict with the general views here expressed. Indeed, some of the reasoning in that case has been adopted in this opinion.

The judgment of the circuit court will be reversed, and the cause will be remanded, with directions to that court to dismiss the bill.

Judgment reversed.[1]

MILLARD F. COOLEY v. JAMES F. GOLDEN.

Kansas City Court of Appeals, 1893.

(52 *Missouri Appeals*, 52.)

Smith, P. J. — This is an action of forcible entry and detainer which was brought before a justice of the peace of Atchison County.

By the act of Congress, approved June 7, 1836, United States Statutes at Large, 34, entitled "An Act to extend the western boundary of the State of Missouri to the Missouri River," it was provided that, when the Indian title to all the lands lying between the State of Missouri and the Missouri River should be extinguished, the jurisdiction over said lands should be thereby ceded to the State of Missouri. It is to be observed that the act ceded the land between the old State line and the river, and the extension of the boundary was to the river, not to the bank, thus making the natural water-course the boundary; and the general rules, construing such words of cession as shown by the adjudged cases, carry that boundary to the centre of the channel. *Benson* v. *Morrow*, 61 Mo. 345; *Jones* v. *Soulard*, 24 How. 41; *Howard* v. *Ingersoll*, 13 How. 381; *Railroad* v. *Devereux*, 41 Fed. Rep. 14; *Missouri* v. *Iowa*, 7 How. 660. And this seems to have been the intention of Congress; for it will be seen by reference to the act providing for the admission of the Territory of Nebraska into the Union that one of the boundaries of the State so admitted should be from the junction of the Niobrara River down the middle of the channel of the latter river following the meanderings thereof, &c. 13 United States Stat-

[1] Sir William Scott states the law tersely in *The Twee Gebroeders*, 1801, 3 C. Rob. 336, 339: "The law of rivers flowing entirely through the provinces of one state is perfectly clear. In the sea, out of the reach of cannon-shot, universal use is presumed. In rivers flowing through coterminous states, a common use to the different states is presumed. Yet in both of these there may, by legal possibility, exist a peculiar property, excluding the universal or the common use. Portions of the sea are prescribed for; so are rivers flowing through contiguous states; the banks on one side may have been first settled, by which the possession and property may have been acquired, or cessions may have taken place upon conquests, or other events. But the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established, on the part of those claiming under it, in the same manner as all legal demands are to be substantiated, by clear and competent evidence."—Ed.

utes at Large, 47. It would be unreasonable to suppose that Congress intended to limit the extention of the territorial jurisdiction of the State of Missouri to the bank of the Missouri, and thus leave a sort of neutral territory between the Missouri shore and the middle of the channel of the river over which neither the States of Missouri nor Nebraska had jurisdiction.

The Constitution of Missouri, section 1, article 1, declared that the boundaries of the State as heretofore established by law are hereby ratified and confirmed; so that it is not to be doubted that Congress by the ceding act extended the northern boundary line of the State to the middle of the channel of the Missouri River, and from thence down the river to the middle of the Kansas River. Act of Congress of March 6, 1820, for the admission of Missouri; Revised Statutes, 1889, 47. In the cession act of June 7, 1836, is embraced what is commonly known as the "Platte purchase," consisting of a number of counties, among which is Atchison, situate in the northwest corner of the State.

At the time of the cession and until the year 1867, the Missouri River in its course along the western boundary of Atchison County made a horseshoe-shaped bend, with toe to the east, and heel pointing to the west. During the spring of the last-named year the river, during a great flood, changed its course by effecting a channel across the heel of the bend, and thus abandoned its former channel around the bend. The bend became a lake and gradually filled up with sedimentary matter until it became solid land, fit for tillage and pasture. The land, the possession of which is in dispute in this suit, is situate in the old abandoned bed of the river in this bend. The decisive questions in the case arise on the instructions given and refused by the court.

The theory of the plaintiff's instructions which were refused by the court was to the effect that if the lands in dispute were situate in the old bed of the river which had become dry on account of the change of its course by cutting off a bend on the Nebraska side and forming a new channel, then in that case it was not material on which side of the main channel of the old river bed the lands in dispute were situate. The theory of the defendant which was adopted by the court was that the ordinary boundary of Atchison County where it borders on the Missouri River extended to the middle of the main channel of the river as the main channel ran or was located in the year 1867 prior to the change or cut-off, and that, unless it was found the land in question was situate in Atchison County, the plaintiff could not recover. The defendant's theory further was that the boundary line of the State of Missouri at the location in question was the middle of the main channel of the Missouri River as the main channel ran before the cut-off in 1867. These theories are wholly irreconcilable. The jury found

under the instructions that the land in dispute was not in Atchison County, and, as there was substantial testimony tending to establish that fact, the finding is conclusive upon us. It seems that the river by its changed course cut off a considerable area of land which was formerly on the Nebraska side, but is now on the Missouri side of it, so that the river as it runs along the western border of this area of cut-off land is wholly within the State of Nebraska.

It is not contended, as we understand it, that the change of the course of the river in 1867 effected a change of the boundary line between the two States as it was fixed in the ceding act, for, if it were, such contention could not be sustained, because it is plain to be seen that the allowance of such consequences might result most disastrously to the geography of the State. The law seems to be well settled that when a river is declared to be the boundary between States, although it may change imperceptibly from natural causes, the river as it runs continues to be the boundary. But, if the river should suddenly change its course or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river bed. *Iowa* v. *Nebraska*, 143 U. S. 359; *St. Louis* v. *Rutz*, 136 U. S. 225; *Missouri* v. *Kentucky*, 11 Wall. 395; *Butterworth* v. *Bridge Co.* 123 Ill. 535; *Holbrook* v. *Moore*, 4 Neb. 437; *Collins* v. *State*, 3 Tex. App. 324; Gould on Waters, sect. 159.

But the real question is whether the States of Missouri and Nebraska have concurrent jurisdiction over the old bed of the river just as was the case when the river ran there before 1867. The jurisdiction of this State over that part of the river which forms a common boundary of the States is concurrent. It extends not only to the middle of the channel but over the entire channel. Constitution, art. 1, sect. 1; *Swearingen* v. *Steamboat*, 13 Mo. 519; *Sanders* v. *Anchor Line*, 97 Mo. 26. But here there is no river, but in its stead is dry land upon which are cultivated fields and pastures. The physical conditions have been changed. Is the case different than if the boundary line between the two States had been located originally on dry land instead in the middle of the channel of the river? We think not. The concurrent jurisdiction of the States of Missouri and Nebraska under their enabling acts does not in any case extend beyond their common boundary, except when that boundary is the middle of the channel of the Missouri River. Congress has imposed this limitation upon its existence. It is difficult to see why it exists here any more than if the river had always run where it did after 1867. The reason for the grant of this concurrent jurisdiction, which is so well and forcibly expressed by Judge Barclay in 97 Mo. *supra*, lends no support to plaintiff's claim of concurrent jurisdiction in this case. The conditions are wanting which

constitute the basis of this jurisdiction. The boundary line between the States is the middle of the former bed of the river, and to this line the jurisdiction of each extends, but the concurrent jurisdiction along there disappeared when the river did.

It is not believed that it was contemplated by Congress or the States that the grant of concurrent jurisdiction of the two States on the river authorized the bringing of an action of forcible entry and detainer or of ejectment in this State for the recovery of lands situate anywhere within the territorial limits of Nebraska. We cannot sustain the theory of the plaintiff's instructions which were to that effect. We do not think that the elimination by the court of a part of the plaintiff's fourth instruction was harmful to him, in view of the issues submitted to the jury by other instructions and found adversely to the plaintiff.

The case was fairly submitted to the jury by the instructions of the court. The judgment seems to be for the right party and so will be affirmed. All concur.[1]

(*b*) *Straits and Lakes.*

UNITED STATES v. RODGERS.

SUPREME COURT OF THE UNITED STATES, 1893.

(150 *United States*, 249.)

Mr. Justice FIELD delivered the opinion of the court.[2]

Several questions of interest arise upon the construction of section 5346 of the Revised Statutes, upon which the indictment in this case was found. The principal one is whether the term "high seas," as there used, is applicable to the open, unenclosed waters of the Great Lakes, between which the Detroit River is a connecting stream. The

[1] See, also, opinion of C. Cushing, 1856, 8 Op. Atty. Gen. 175. For disputes concerning the right freely to use and navigate the Mississippi, see Dana's Wheaton, 279–283; Snow's American Diplomacy, 4, 67, 106; for the St. Lawrence, Dana's Wheaton, 283–287, and Dana's note, 287–288; Snow's Am. Dip. 99; for European rivers, Dana's Wheaton, 275–279; Schuyler's Am. Dip.; Calvo's Int. Law, 5th ed., vol. 1, 433–446; Hertslet's Map of Europe by Treaty; Engelhardt, in the Revue de Droit International, vol. 11, 363–381; of South American rivers, the River La Plata, with its branches, the Parana and the Uruguay, was opened to general commerce during the period from 1851 to 1859, and the Amazon during that from 1858–1867, Dana's Wheaton, 287–288, note 118; Schuyler's Am. Dip. 319–344; Calvo, I., 451–455; of African rivers the Congo and Niger were by Conference of Berlin (1885) declared free and open to navigation (Calvo, I 455–463). See articles by M. Duchêne: Le Droit de Navigation dans Le Niger (2 R. G. D. I. 439–447); M. Pillet: La Liberté de Navigation du Niger (3 id. 190–223) — ED.

[1] Statement of the case omitted. — ED.

term was formerly used, particularly by writers on public law, and generally in official communications between different governments, to designate the open, unenclosed waters of the ocean, or of the British seas, outside of their ports and havens. At one time it was claimed that the ocean, or portions of it, were subject to the exclusive use of particular nations. The Spaniards, in the 16th century, asserted the right to exclude all others from the Pacific Ocean. The Portuguese claimed, with the Spaniards, under the grant of Pope Alexander VI., the exclusive use of the Atlantic Ocean west and south of a designated line. And the English, in the 17th century, claimed the exclusive right to navigate the seas surrounding Great Britain. Woolsey on International Law, § 55.

In the discussions which took place in support of and against these extravagant pretensions the term "high seas" was applied, in the sense stated. It was also used in that sense by English courts and law writers. There was no discussion with them as to the waters of other seas. The public discussions were generally limited to the consideration of the question whether the high seas, that is, the open, unenclosed seas, as above defined, or any portion thereof, could be the property or under the exclusive jurisdiction of any nation, or whether they were open and free to the navigation of all nations. The inquiry in the English courts was generally limited to the question whether the jurisdiction of the admiralty extended to the waters of bays and harbors, such extension depending upon the fact whether they constituted a part of the high seas.

In his treatise on the rights of the sea, Sir Matthew Hale says: "The sea is either that which lies within the body of a county, or without. That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and, therefore, within the jurisdiction of the sheriff or coroner. That part of the sea which lies not within the body of a county is called the main sea or ocean." De Jure Maris, c. iv. By the "main sea" Hale here means the same thing expressed by the term "high sea" — "*mare altum*," or "*le haut mer*."

In *Waring* v. *Clarke*, 5 How. 440, 453, this court said that it had been frequently adjudicated in the English common law courts since the restraining statutes of Richard II. and Henry IV., "that high seas mean that portion of the sea which washes the open coast." In *United States* v. *Grush*, 5 Mason, 290, it was held by Mr. Justice Story, in the United States Circuit Court, that the term "high seas," in its usual sense, expresses the unenclosed ocean or that portion of the sea which is without the *fauces terræ* on the seacoast, in contradistinction

to that which is surrounded or enclosed between narrow headlands or promontories. It was the open, unenclosed waters of the ocean, or the open, unenclosed waters of the sea, which constituted the "high seas" in his judgment. There was no distinction made by him between the ocean and the sea, and there was no occasion for any such distinction. The question in issue was whether the alleged offences were committed within a county of Massachusetts on the seacoast, or without it, for in the latter case they were committed upon the high seas and within the statute. It was held that they were committed in the County of Suffolk, and thus were not covered by the statute.

If there were no seas other than the ocean, the term "high seas" would be limited to the open, unenclosed waters of the ocean. But as there are other seas besides the ocean, there must be high seas other than those of the ocean. A large commerce is conducted on seas other than the ocean and the English seas, and it is equally necessary to distinguish between their open waters and their ports and havens, and to provide for offences on vessels navigating those waters and for collisions between them. The term "high seas" does not, in either case, indicate any separate and distinct body of water; but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the coast. This distinction was observed by Latin writers between the ports and havens of the Mediterranean and its open waters — the latter being termed the high seas.[1] In that sense the term may also be properly used in reference to the open waters of the Baltic and the Black Sea, both of which are inland seas, finding their way to the ocean by a narrow and distant channel. Indeed, wherever there are seas in fact, free to the navigation of all nations and people on their borders, their open waters outside of the portion "surrounded or enclosed between narrow headlands or promontories," on the coast, as stated by Mr. Justice Story, or "without the body of a county," as declared by Sir Matthew Hale, are properly characterized as high seas, by whatever name the bodies of water of which they are a part may be designated. Their names do not determine their character. There are, as said above, high seas on the Mediterranean (meaning outside of the enclosed waters along its coast), upon which the principal commerce of the ancient world was conducted and its great naval battles fought. To hold that on such seas there are no high seas, within the true meaning of that term, that is, no open, unenclosed waters, free to the navigation of all nations and people on

[1] "Insula *portum*
Efficit objectu laterum, quibus omnis ab *alto*
Frangitur, inque sinus scindit sese unda reductos."
— *The Æneid, Lib.* 1, v. 159–161.

their borders, would be to place upon that term a narrow and contracted meaning. We prefer to use it in its true sense, as applicable to the open, unenclosed waters of all seas, than to adhere to the common meaning of the term two centuries ago, when it was generally limited to the open waters of the ocean and of seas surrounding Great Britain, the freedom of which was then the principal subject of discussion. If it be conceded, as we think it must be, that the open, unenclosed waters of the Mediterranean are high seas, that concession is a sufficient answer to the claim that the high seas always denote the open waters of the ocean.

Whether the term is applied to the open waters of the ocean or of a particular sea, in any case, will depend upon the context or circumstances attending its use, which in all cases affect, more or less, the meaning of language. It may be conceded that if a statement is made that a vessel is on the high seas, without any qualification by language or circumstance, it will be generally understood as meaning that the vessel is upon the open waters of one of the oceans of the world. It is true, also, that the ocean is often spoken of by writers on public law as *the sea*, and characteristics are then ascribed to the sea generally which are properly applicable to the ocean alone; as, for instance, that its open waters are the highway of all nations. Still the fact remains that there are other seas than the ocean whose open waters constitute a free highway for navigation to the nations and people residing on their borders, and are not a free highway to other nations and people, except there be free access to those seas by open waters or by conventional arrangements.

As thus defined, the term would seem to be as applicable to the open waters of the great northern lakes as it is to the open waters of those bodies usually designated as seas. The Great Lakes possess every essential characteristic of seas. They are of large extent in length and breadth; they are navigable the whole distance in either direction by the largest vessels known to commerce; objects are not distinguishable from the opposite shores; they separate, in many instances, States, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debouch into the ocean. The fact that their waters are fresh and not subject to the tides, does not affect their essential character as seas. Many seas are tideless, and the waters of some are saline only in a very slight degree.

The waters of Lake Superior, the most northern of these lakes, after traversing nearly 400 miles, with an average breadth of over 100 miles, and those of Lake Michigan, which extend over 350 miles, with an average breadth of 65 miles, join Lake Huron, and, after flowing about 250 miles, with an average breadth of 70 miles, pass into the river St.

Clair; thence through the small lake of St. Clair into the Detroit River; thence into Lake Erie and, by the Niagara River, into Lake Ontario; whence they pass, by the river St. Lawrence, to the ocean, making a total distance of over 2,000 miles. Ency. Britannica, vol. 21, p. 178. The area of the Great Lakes, in round numbers, is 100,000 square miles. Ibid. vol. 14, p. 217. They are of larger dimensions than many inland seas which are at an equal or greater distance from the ocean. The waters of the Black Sea travel a like distance before they come into contact with the ocean. Their first outlet is through the Bosphorus, which is about 20 miles long and for the greater part of its way less than a mile in width, into the sea of Marmora, and through that to the Dardanelles, which is about 40 miles in length and less than four miles in width, and then they find their way through the islands of the Greek Archipelago, up the Mediterranean Sea, past the Straits of Gibraltar to the ocean, a distance, also, of over 2,000 miles.

In the *Genesee Chief Case*, 12 How. 443, this court, in considering whether the admiralty jurisdiction of the United States extended to the Great Lakes, and speaking, through Chief Justice Taney, of the general character of those lakes, said: "These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general Government on the Atlantic seas applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established, neither can the other." (p. 453.)

After using this language, the Chief Justice commented upon the inequality which would exist, in the administration of justice, between the citizens of the States on the lakes, if, on account of the absence of tide water in those lakes, they were not entitled to the remedies afforded by the grant of admiralty jurisdiction of the Constitution, and the citizens of the States bordering on the ocean or upon navigable waters affected by the tides. The court, perceiving that the reason for the exercise of the jurisdiction did not in fact depend upon the tidal character of the waters, but upon their practical navigability for the purposes of commerce, disregarded the test of tide water prevailing in England as inapplicable to our country with its vast extent of inland waters. Acting upon like considerations in the application of the term "high seas" to the waters of the Great Lakes, which are equally navigable, for the purposes of commerce, in all respects, with the bodies of

water usually designated as seas, and are in no respect affected by the tidal or saline character of their waters, we disregard the distinctions made between salt and fresh water seas, which are not essential, and hold that the reason of the statute, in providing for protection against violent assaults on vessels in tidal waters, is no greater but identical with the reason for providing against similar assaults on vessels in navigable waters that are neither tidal nor saline. The statute was intended to extend protection to persons on vessels belonging to citizens of the United States, not only upon the high seas, but in all navigable waters of every kind out of the jurisdiction of any particular State, whether moved by the tides or free from their influence.

The character of these lakes as seas was recognized by this court in the recent *Chicago Lake Front Case*, where we said: "These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide." "In other respects," we added, "they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes." *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 435.

It is to be observed also that the term "high" in one of its significations is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public is a "high" way. So a large body of navigable water other than a river, which is of an extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation or people, but is the free highway of adjoining nations or people, must fall under the definition of "high seas" within the meaning of the statute. We may as appropriately designate the open, unenclosed waters of the lakes as the high seas of the lakes, as to designate similar waters of the ocean as the high seas of the ocean, or similar waters of the Mediterranean as the high seas of the Mediterranean.

The language of section 5346, immediately following the term "high seas," declaring the penalty for violent assaults when committed on board of a vessel in any arm of the sea or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, equally as when committed on board of a vessel on the high seas, lends force to the construction given to that term. The language used must be read in conjunction with that term, and as referring to navigable waters out of the jurisdiction of any particular State, but connecting with the

high seas mentioned. The Detroit River, upon which was the steamer *Alaska* at the time the assault was committed, connects the waters of Lake Huron (with which, as stated above, the waters of Lake Superior and Lake Michigan join) with the waters of Lake Erie, and separates the Dominion of Canada from the United States, constituting the boundary between them, the dividing line running nearly midway between its banks, as established by commissioners, pursuant to the treaty between the two countries. 8 Stat. 274, 276. The river is about 22 miles in length and from one to three miles in width, and is navigable at all seasons of the year by vessels of the largest size. The number of vessels passing through it each year is immense. Between the years 1880 and 1892, inclusive, they averaged from thirty-one to forty thousand a year, having a tonnage varying from sixteen to twenty-four millions. In traversing the river they are constantly passing from the territorial jurisdiction of the one nation to that of the other. All of them, however, so far as transactions had on board are concerned, are deemed to be within the country of their owners. Constructively they constitute a part of the territory of the nation to which the owners belong. Whilst they are on the navigable waters of the river they are within the admiralty jurisdiction of that country. This jurisdiction is not changed by the fact that each of the neighboring nations may in some cases assert its own authority over persons on such vessels in relation to acts committed by them within its territorial limits. In what cases jurisdiction by each country will be thus asserted and to what extent, it is not necessary to inquire, for no question on that point is presented for our consideration. The general rule is that the country to which the vessel belongs will exercise jurisdiction over all matters affecting the vessel or those belonging to her, without interference of the local government, unless they involve its peace, dignity, or tranquillity, in which case it may assert its authority. *Wildenhus's Case*, 120 U. S. 1, 12; Halleck on International Law, c. vii, § 26, p. 172. The admiralty jurisdiction of the country of the owners of the steamer upon which the offence charged was committed is not denied. They being citizens of the United States, and the steamer being upon navigable waters, it is deemed to be within the admiralty jurisdiction of the United States. It was, therefore, perfectly competent for Congress to enact that parties on board committing an assault with a dangerous weapon should be punished when brought within the jurisdiction of the District Court of the United States. But it will hardly be claimed that Congress by the legislation in question intended that violent assaults committed upon persons on vessels owned by citizens of the United States in the Detroit River, without the jurisdiction of any particular State, should be punished, and that similar offences upon

persons on vessels of like owners upon the adjoining lakes should be unprovided for. If the law can be deemed applicable to offences committed on vessels in any navigable river, haven, creek, basin, or bay, connecting with the lakes, out of the jurisdiction of any particular State, it would not be reasonable to suppose that Congress intended that no remedy should be afforded for similar offences committed on vessels upon the lakes, to which the vessels on the river, in almost all instances, are directed, and upon whose waters they are to be chiefly engaged. The more reasonable inference is that Congress intended to include the open, unenclosed waters of the lakes under the designation of high seas. The term, in the eye of reason, is applicable to the open, unenclosed portion of all large bodies of navigable waters, whose extent cannot be measured by one's vision, and the navigation of which is free to all nations and people on their borders, by whatever names those bodies may be locally designated. In some countries small lakes are called seas, as in the case of the Sea of Galilee, in Palestine. In other countries large bodies of water, greater than many bodies denominated seas, are called lakes, gulfs, or basins. The nomenclature, however, does not change the real character of either, nor should it affect our construction of terms properly applicable to the waters of either. By giving to the term "high seas" the construction indicated, there is consistency and sense in the whole statute, but there is neither if it be disregarded. If the term applies to the open, unenclosed waters of the lakes, the application of the legislation to the case under indictment cannot be questioned, for the Detroit River is a water connecting such high seas, and all that portion which is north of the boundary line between the United States and Canada is without the jurisdiction of any State of the Union. But if they be considered as not thus applying, it is difficult to give any force to the rest of the statute without supposing that Congress intended to provide against violence on board of vessels in navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any particular State, and intentionally omitted the much more important provision for like violence and disturbances on vessels upon the Great Lakes. All vessels in any navigable river, haven, creek, basin, or bay of the lakes, whether within or without the jurisdiction of any particular State, would some time find their way upon the waters of the lakes; and it is not a reasonable inference that Congress intended that the law should apply to offences only on a limited portion of the route over which the vessels were expected to pass, and that no provision should be made for such offences over a much greater distance on the lakes.

Congress in thus designating the open, unenclosed portion of large bodies of water, extending beyond one's vision, naturally used the same

term to indicate it as was used with reference to similar portions of the ocean or of bodies which had been designated as seas. When Congress, in 1790, first used that term the existence of the Great Lakes was known; they had been visited by great numbers of persons in trading with the neighboring Indians, and their immense extent and character were generally understood. Much more accurate was this knowledge when the act of March 3, 1825, was passed, 4 Stat., 115, c. 65, and when the provisions of section 5346 were re-enacted in the Revised Statutes in 1874. In all these cases, when Congress provided for the punishment of violence on board of vessels, it must have intended that the provision should extend to vessels on those waters the same as to vessels on seas, technically so called. There were no bodies of water in the United States to any portion of which the term "high seas" was applicable if not to the open, unenclosed waters of the Great Lakes. It does not seem reasonable to suppose that Congress intended to confine its legislation to the high seas of the ocean, and to its navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any State, and to make no provision for offences on those vast bodies of inland waters of the United States. There are vessels of every description on those inland seas now carrying on a commerce greater than the commerce on any other inland seas of the world. And we cannot believe that the Congress of the United States purposely left for a century those who navigated and those who were conveyed in vessels upon those seas without any protection.

The statute under consideration provides that every person who, upon the high seas or in any river connecting with them, as we construe its language, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, commits, on board of any vessel belonging in whole or in part to the United States, or any citizen thereof, an assault on another with a dangerous weapon or with intent to perpetrate a felony, shall be punished, &c. The Detroit River, from shore to shore, is within the admiralty jurisdiction of the United States, and connects with the open waters of the lakes — high seas, as we hold them to be, within the meaning of the statute. From the boundary line, near its centre, to the Canadian shore it is out of the jurisdiction of the State of Michigan. The case presented is therefore directly within its provisions. The act of Congress of September 4, 1890, 26 Stat. 424, chap. 874 (1 Sup. to the Rev. Stat., chap. 874, p. 799), providing for the punishment of crimes subsequently committed on the Great Lakes, does not, of course, affect the construction of the law previously existing.

We are not unmindful of the fact that it was held by the Supreme Court of Michigan in *People* v. *Tyler*, 7 Michigan, 161, that the criminal

jurisdiction of the Federal courts did not extend to offences committed upon vessels on the lakes. The judges who rendered that decision were able and distinguished; but that fact, whilst it justly calls for a careful consideration of their reasoning, does not render their conclusion binding or authoritative upon this court. Their opinions show that they did not accept the doctrine extending the admiralty jurisdiction to cases on the lakes and navigable rivers, which is now generally, we might say almost universally, received as sound by the judicial tribunals of the country. It is true, as there stated, that, as a general principle, the criminal laws of a nation do not operate beyond its territorial limits, and that to give any government, or its judicial tribunals, the right to punish any act or transaction as a crime, it must have occurred within those limits. We accept this doctrine as a general rule, but there are exceptions to it as fully recognized as the doctrine itself. One of those exceptions is that offences committed upon vessels belonging to citizens of the United States, within their admiralty jurisdiction (that is, within navigable waters), though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within their territorial jurisdiction. As we have before stated, a vessel is deemed part of the territory of the country to which she belongs. Upon that subject we quote the language of Mr. Webster, while Secretary of State, in his letter to Lord Ashburton of August, 1842. Speaking for the government of the United States, he stated with great clearness and force the doctrine which is now recognized by all countries. He said: "It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the state retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign state or sovereignty, the offence is cognizable and punishable by the proper court of the United States in the same manner as if such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or

owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself." 6 Webster's Works, 306, 307.

We do not accept the doctrine that, because by the treaty between the United States and Great Britain the boundary line between the two countries is run through the centre of the lakes, their character as seas is changed, or that the jurisdiction of the United States to regulate vessels belonging to their citizens navigating those waters and to punish offences committed upon such vessels, is in any respect impaired. Whatever effect may be given to the boundary line between the two countries, the jurisdiction of the United States over the vessels of their citizens navigating those waters and the persons on board remains unaffected. The limitation to the jurisdiction by the qualification that the offences punishable are committed on vessels in any arm of the sea, or in any river, haven, creek, basin, or bay "without the jurisdiction of any particular State," which means without the jurisdiction of any State of the Union, does not apply to vessels on the "high seas" of the lakes, but only to vessels on the waters designated as connecting with them. So far as vessels on those seas are concerned, there is no limitation named to the authority of the United States. It is true that lakes, properly so called, that is, bodies of water whose dimensions are capable of measurement by the unaided vision, within the limits of a State, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which cannot be measured by the unaided vision, and which are navigable at all times in all directions, and border on different nations or States or people, and find their outlet in the ocean as in the present case, are seas in fact, however they may be designated. And seas in fact do not cease to be such, and become lakes, because by local custom they may be so called.[1]

[1] Dissenting opinions of Mr. Justice Gray and Mr. Justice Brown omitted.

Distinguished in *U. S.* v. *Peterson*, 1894, 64 Fed. 145; *Bigelow* v. *Nickerson*, 1895, 70 Fed. 116.

For international controversies concerning sounds and straits, see the Danish

(c) *Bays.*

THE "ALLEGANEAN."

(STETSON v. THE UNITED STATES.)

COURT OF COMMISSIONERS OF ALABAMA CLAIMS, 1885.

(32 *Albany Law Journal*, 484; 4 *Moore's International Arbitration*, 4333; 5 *id.* 4675.)

Claim to recover damages for destruction of a vessel. The opinion states the facts.

Henry M. Baker, for claimants.

John H. A. Creswell, for United States.

DRAPER, J., delivered the opinion of the court.[1]

The facts upon which a judgment to the amount of $69,334.80 is prayed for in this case are substantially as follows:

The ship *Alleganean*, duly registered at the port of New York, and being recently repaired and well equipped, and entitled to the protection of the United States, cleared with a cargo from the port of Baltimore on the 22d of October, 1862, upon a voyage to London. Six days later, at about 10.30 o'clock in the evening, being at anchor, through rough water in Chesapeake Bay, south of the mouth of the Rappahannock River, and opposite Guinn's Island, she was boarded by some eighteen officers and men of the Confederate navy, commanded by Lieutenants John Taylor Wood and S. Smith Lee. These leaders were commissioned officers in the Confederate navy, and in the attack upon the Alleganean they were acting under the special orders of the Secretary of the Navy of the Confederate States, and the men accompanying them had been specially detailed from the James River squadron, for the purpose of preying upon United States merchant vessels in Chesapeake Bay. They came overland to Chesapeake Bay from the Patrick Henry, an armed and commissioned Confederate vessel, and securing two or three small vessels — the largest being of fifteen or twenty tons burden — had been cruising about two or three nights before the attack. The precise relationship which these vessels bore to the Confederate navy is left by the evidence in some doubt.

Lieutenant Wood says of the vessel in which he operated: "She

Claim to sound dues (Dana's Wheaton, 264–267; Snow's Am. Dip. 124–127); The Bosphorus and Dardanelles, (Dana's Wheaton, 263–264, 273–274, Dana's note, No. 111; Schuyler's Am. Dip., 317). — ED.

[1] Hon. Andrew S. Draper, LL.D., now President of the University of Illinois. — ED.

was a boat fitted out for this purpose, and attached to the squadron as a tender. She was about fifteen or twenty tons, armed as customary with this class of boats. * * * The tender which I commanded was one belonging to a regular commissioned ship of the Confederate States navy." Lieutenant Lee says: "We had two small boats that we obtained on the bay shore, with sails and a sailing skiff we captured from two Union men. No boats were brought from Richmond or from any Confederate cruiser."

There is no proof, and it was not contended upon the argument, that they were either "in commission" of, or that they bore letters of marque from, the Confederate government, but there seems to be ample evidence that the crews were a part of the naval forces of that government, attached to duly commissioned, armed war vessels, and now only temporarily detached therefrom, and coming directly from such a vessel for this special service, under orders of their Secretary of the Navy. These small boats seem to have carried no armament. Lieutenant Wood says: "The vessels were armed as customary with this class of boats," and that "the men were armed and equipped as men-of-war's men." Lieutenant Lee says, "The vessels carried no guns, but the men were armed with cutlasses and pistols."

This force boarded the *Alleganean*, as stated, speedily reduced the crew of that vessel to subjection and the state of prisoners of war, and then burned the ship, totally destroying her, except that some few remnants were afterwards picked up and disposed of, the proceeds of which the owners account for in making up their claim.

The value of the *Alleganean* at the time of loss is placed by the marine experts on behalf of the Government at $52,591.03, and by the witnesses for the claimants at amounts varying from $60,000 to $75,000. The evidence seems to establish beyond question the fact that the vessel was more than four miles from any shore at the time of capture and destruction.

The claimant's counsel, with his case as exhaustively prepared and as fully and ably argued as any which has been before this court, contends that these facts establish a right to a judgment, as of the first class, under the provisions of section 5 of the act of June 5, 1882, being a claim "directly resulting from damage done on the high seas by Confederate cruisers during the late rebellion, including vessels and cargoes attacked on the high seas, although the loss or damage occurred within four miles of the shore."

The learned counsel on behalf of the United States insists that the claimants ought not to recover.

First, because all the waters of Chesapeake Bay, even such as are more than a marine league from shore, are territorial waters of the

United States, and subject to the exclusive control and jurisdiction thereof, and that in consequence the *Alleganean* was not attacked nor the damage done on the "high seas" within the meaning of the term as used in the act under which judgment is claimed.

Second, because the persons who destroyed the ship and the vessels employed by them did not constitute a "Confederate cruiser" within the meaning of that term as used in the statute.

The term "high seas" as used by legislative bodies, the courts and text-writers, has been construed to express a widely different meaning. As used to define the jurisdiction of admiralty courts, it is held to mean the waters of the ocean exterior to low-water mark. As used in international law, to fix the limits of the open ocean, upon which all peoples possess common rights, the "great highway of nations," it has been held to mean only so much of the ocean as is exterior to a line running parallel with the shore, and some distance therefrom, commonly such distance as can be defended by artillery upon the shore, and, therefore, a cannon-shot or a marine league (three nautical or four statute miles). This court, after very able argument by learned counsel, and after much deliberation, has held that the term was used in the act of June 5, 1882, in the same sense in which it is employed by the international law writers. *Rich* v. *United States.*

From this it necessarily follows that such portions of the waters of Chesapeake Bay as are within four miles of either shore form no part of the high seas. But much of the bay is more than four miles from shore, and is accessible from the ocean without coming within that distance of the land. The distance between Cape Henry and Cape Charles, at the entrance of the bay, is said to be twelve miles, and it is stated that lines starting from points between the Capes, four miles from each, and running up the bay that distance from either shore, would not intercept each other within 125 miles from the starting points. The evidence shows that the *Alleganean* was anchored between such lines at the time of destruction. Was she upon the high seas as the court defines the statutory term?

By common agreement all the authorities assert that there are arms or inlets of the ocean, which are within territorial jurisdiction, and are not high seas, Sir R. Phillimore (1 Int. Law, §200), says: "Besides the rights of property and jurisdiction within the limit of cannon-shot from the shore, there are certain portions of the sea which, though they exceed this verge, may under special circumstances be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries, which are enclosed, but not entirely surrounded, by lands belonging to one and the same State. * * * Thus Great Britain has immemorially claimed and exercised exclusive

property and jurisdiction over the bays or portions of the sea cut off by lines drawn from one promontory to another, and called the King's Chambers." Grotius (bk. 11, ch. 3, §§ 7, 8), and Vattel (vol. 1, bk. 1, ch. 23, § 291) assert substantially the same doctrine, and the later writers follow them. Wheat. Int. Law (Dana's 8th Ed., p. 255) says:

"The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea, inclosed by headlands, belonging to the same state. The usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along the coasts of the state. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation." Chancellor Kent avows the general doctrine and makes very much broader claims in reference to the jurisdiction of the United States over adjacent waters, and says (Com., vol. 1, pp. 29, 30):

"Considering the great line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of waters on our coasts, though included within lands stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi."

Dr. Woolsey (Int. Law, § 60), upholds the general doctrine, but thinks the claims of Chancellor Kent are too broad, and rather "out of character for a nation that has ever asserted the freedom of doubtful waters, as well as contrary to the spirit of more recent times."

Dr. Wharton (Int. Law, § 192), finishes the subject with the conclusion: "That it would seem more proper to adopt the test of cannon-shot, * * * which would, in case of waters whose headlands belong to the same sovereign, exclude all bays more than eighteen miles in diameter, assuming the range of cannon-shot to be nine miles. But this should be made to yield to usage. If a particular nation has exercised dominion over a bay, and this has been acquiesced in by other nations, then the bay is to be regarded as belonging to such nation."

We are quite certain that none of the American courts have passed upon this subject, although decisions holding that specified waters are within or without the jurisdiction of the admiralty courts are numerous. The question has, however, been before the English courts upon two occasions at least.

Reg. v. *Cunningham,* Bell Crown Cas. 72, was the case of a crime

committed upon an American vessel lying in the Bristol Channel, about three-quarters of a mile off the shores of the county of Glamorgan, in Wales, but below or exterior to low-water mark, and perhaps ten miles from the shores of the county of Somerset, in England. The prisoners were indicted and tried in Glamorgan. The question was whether the crime was committed within the county of Glamorgan or upon the high seas. It was held that it was within the county. This crime was committed, it is true, within the marine league from shore, but the court did not rest its conclusion upon that ground. Lord Chief Justice Cockburn, delivering the opinion of the court, said:

"Looking at the local situation of this sea, it must be taken to belong to the counties, respectively, by the shores of which it is bounded. * * * The whole of this inland sea, between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several ports are respectively bounded."

But perhaps the most thoroughly considered and important case is that of *Direct U. S. Cable Co.* v. *Anglo-American Tel. Co.* in the House of Lords (2 App. Cas. 394). It came up on an appeal from the Supreme Court of Newfoundland, against an order confirming an injunction preventing the Direct Cable Company from landing their wire upon the soil of Newfoundland, on the ground that it would be an infringement of the rights of the Anglo-American Company. The cable, as a matter of fact, was buoyed in Conception Bay, more than a marine league from shore, and it nowhere came within that distance from the shore, purposely to avoid coming within territorial jurisdiction. But it was asserted that the whole of Conception Bay was within the territory and jurisdiction of Newfoundland. The Supreme Court of the province so held, and the determination was upheld by the House of Lords in a somewhat elaborate opinion.

This opinion states that Conception Bay is a body of water having an average width of fifteen miles, a distance of forty miles from the head to one of the capes at the entrance, and fifty miles to the other, and a distance of twenty miles between the headlands. Coming to the question, the Lords say (p. 419):

"We find an universal agreement that harbors, estuaries, and bays landlocked, belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'a bay' for this purpose.

"It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory, and with this idea, most of the writers on the subject refer to defensi-

bility from the shore as the test of occupation; some suggesting, therefore, a width of one cannon-shot from shore to shore, or three miles; some a cannon-shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the British Channel which in *Reg.* v. *Cunningham* was decided to be in the county of Glamorgan. It does not appear to their lordships that jurists and text-writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule the difficulty of the task would not deter their lordships from attempting to fulfill it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations. * * * This would be very strong in the tribunals of any country to show that by prescription this bay is a part of the exclusive territory of Great Britain. In a British tribunal it is decisive."

We must now examine the local circumstance, the status of Chesapeake Bay, and then determine whether those waters should be held to be the open ocean or jurisdictional waters of the United States in the light of these authorities.

The headlands are about twelve miles apart, and the bay is probably nowhere more than twenty miles in width. The length may be two hundred miles. To call it a bay is almost a misnomer. It is more a mighty river than an arm or inlet of the ocean. It is entirely encompassed about by our own territory, and all of its numerous branches and feeders have their rise and their progress wholly in and through our own soil. It cannot become an international commercial highway; it is not and cannot be made a roadway from one nation to another.

The second charter of King James I. to the Virginia Company in the year 1609 granted: "All those lands, countries, and territories situate, lying and being in that part of America, called Virginia, from the point of land called Cape or Point Comfort, all along the seacoasts to the northward, two hundred miles, and all along the seacoasts to the southward, two hundred miles, and all that space and circuit of land lying from the seacoast of the precinct aforesaid up into the land throughout from sea to sea, west and northwest, together with all the soils, grounds, havens, ports, * * * rivers, waters, fishings," &c.

This language would seem to place Chesapeake Bay within the boundary lines of Virginia. A line running north (as near as may be) from Point Comfort along the seacoast crosses the mouth of the bay from Cape Henry to Cape Charles.

By the King James charter to Lord Baltimore, in 1632, creating the territory of Maryland, the southern boundary line is made to cross Chesapeake Bay from Smith's Point, at the mouth of the Potomac River, to Watkins' Point, on the eastern shore, which apparently places a portion of this bay within the territory of Maryland. Had this not been intended the boundary would presumably have followed the shore line around the bay.

It is a part of the common history of the country that the States of Virginia and Maryland have from their earliest territorial existence claimed jurisdiction over these waters, and it is of general knowledge that they still continue so to do.

The legislation of Congress has assumed Chesapeake Bay to be within the territorial limits of the United States. The acts of July 31, 1789, ch. 5; August 4, 1790, ch. 35; and March 2, 1799, ch. 128, § 11, establishing revenue districts, provided that "the authority of the officers of the district (Norfolk to Portsmouth) shall extend over all the waters, shores, bays, harbors, and inlets comprehended within a line drawn from Cape Henry to the mouth of James River." By section 549, Rev. Stat. U. S., the eastern judicial district of Virginia embraces the "residue of the State," not included in the western district. The boundaries of the State include all of Chesapeake Bay south of a line running from Smith's Point to Watkins' Point, and hence the eastern district must embrace so much of the bay.

The position taken by this Government and by England and France in the matter of the British brig *Grange*, captured in Delaware Bay in 1793 by the French vessel [privateer] *l'Embuscade* (1 Am. State Papers, 147, 149), has, it seems to us, an important bearing upon the question under discussion. The brig was seized and the crew made prisoners, the two foreign governments being at war. The British government must have demanded that the United States compel France to release the captured vessel on the ground that the seizure was unlawful as having been made in our territorial and neutral waters. The State Papers do not show this demand, but it is not material. The opinion of the Attorney-General was asked, and was given somewhat elaborately by Mr. Randolph. 1 Op. Att'ys Gen'l. 32. It quotes the text-writers, and concludes that the whole of Delaware Bay is within the territorial jurisdiction of the United States, regardless of the marine league or cannon-shot limit from the shore. The learned Attorney-General says: "In like manner is excluded every consideration of how

far the spot of seizure was capable of being defended by the United States; for although it will not be conceded that this could not be done, yet will it rather appear that the mutual rights of the States of New Jersey and Delaware up to the middle of the river supersede the necessity of such an investigation. No. The corner-stone of our claim is that the United States are proprietors of the lands on both sides of the Delaware from its head to its entrance into the sea."

Acting upon the opinion of the Attorney-General, the Secretary of State, Mr. Jefferson, demanded that France should make restitution of the *Grange*, and set the prisoners taken upon her at liberty, which demand was promptly and cheerfully complied with by the French government.

If it be said that the mere claims of a nation to jurisdiction over adjacent waters are to be accepted with some degree of hesitation, then the action in reference to the *Grange* is of much weight, for there the claim made by the United States was promptly acquiesced in by two great foreign powers, when passions were excited, and when such acquiescence was greatly against the immediate interest of one of the combatants, as well as against the general interest of both.

It will hardly be said that Delaware Bay is any the less an inland sea than Chesapeake Bay. Its configuration is not such as to make it so, and the distance from Cape May to Cape Henlopen is apparently as great as that between Cape Henry and Cape Charles.

Reflection upon the subject has caused the court to consider this question of very considerable national importance. Contingencies might arise which would make it of very grave import. The "high sea" belongs to all alike. It is the great highway of nations. One cannot lawfully do anything upon it which any other has not the right to do. One cannot exercise sovereignty over it. Can an American court concede as much as to Chesapeake Bay? Other nations, by common consent of all, have well-recognized peaceable rights even in our territorial waters. Ought we to admit that they have any rights hostile to the United States, or can we permit belligerent operations between foreign nations within the shores of this bay? What injustice can be done to any other nation by the United States exercising sovereign control over these waters? What annoyance and what injury may not come to the United States through a failure to do so?

Considering therefore the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart; that it and its tributaries are wholly within our own territory; that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has

been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another, and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig *Grange* and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States, and no part of the "high seas" within the meaning of the term as used in section 5 of the act of June 5, 1872. Having arrived at the foregoing conclusion, it is perhaps unnecessary to consider the second objection to a recovery raised by the Government counsel, viz., that the damage was not done by a "Confederate cruiser." But as the claim is important, and as the action of the court is final, it is deemed best that our determination of it should not rest wholly upon our conclusions as to a single complicated law question, and the more so since we entertain very decided convictions that under previous decisions the second objection is an insuperable obstacle to recovery by the claimant.

The meaning of the term "Confederate crusier" was defined by this court in the case of the *Roanoke* (*Warren* v. *United States*), French, J., delivering the opinion in these words: "We can reach no other conclusion than that the phrase 'Confederate cruiser,' as found in the act of 1882, was intended by Congress to include only armed vessels, public or private, fitted for hostile operations upon the high seas, and acting under the authority of the Confederate government."

In the case of the *Lenox* (*Lindsey* v. *United States*), Harlan, J., delivering the opinion of the court, said: "In the opinion of the court the mere presence of armed men on board and in control of a vessel on the high seas is not sufficient to establish the character of the craft as a Confederate cruiser within the meaning of the statute. And if the vessel used in effecting this capture had been of such construction, or so armed and equipped as to be itself an implement of warfare, on the high seas, being under the control of an effective force of armed men, it would still have been necessary to prove by competent evidence that the expedition was at the time acting under the authority of the Confederate government to bring it within the requirements of the statute." Proceeding, the court said: "But if it had been conclusively proved that said Duke (The commander of the Confederate force) was at the time of the capture of the *Lenox* an officer in the Confederate navy, that fact, and his presence in command of a ship on the high seas, would not in the opinion of the court, considered in the light of all the decisions cited on the trial, raise the legal presumption that he was

acting under the authority of the Confederate government, unless it were also shown that the ship was a public vessel in commission or its tender belonging to the Confederate government. Even if found in command of a private vessel sailing under authority of a letter of marque, his authority would depend on the letter rather than his commission as a naval officer."

From these decisions, in order to constitute a "Confederate cruiser" there must have been, first, an armed vessel, and second, the vessel must have been a commissioned vessel of the Confederate navy, or she must have carried letters of marque from the Confederate government. Further than this, the fact that the crew were a part of the Confederate naval forces, and were acting under authority of the Confederate government, would not supply the absence of letters of marque.

The vessels employed in the destruction of the *Alleganean* were not armed, they were not in commission, and they had no letters of marque. The official and authorized character of the men could not do away with the necessity of authority running to the vessels themselves, nor could the fact that the men were armed supply the lack of armament upon the vessels in order to bring them up to the character of "cruisers."

The learned counsel for the claimants, with much earnestness and ingenuity, undertakes to meet the difficulty upon the theory that the vessels employed were tenders to the *Patrick Henry*, a duly commissioned and armed vessel of the Confederate navy, and argues that a cruiser can send her boats and men off to a distance and commit depredations at arm's length, and that the damage in this case was in fact and effect done by the *Patrick Henry* herself. It is difficult to see how this view of the statement of Wood that the boats were tenders of the cruiser can be sustained in the face of his testimony that, "I went at once to Matthews County, Virginia, near Point Comfort, and there found a suitable boat, fitted her as a man-of-war launch" (p. 57, Record), and in the face of the testimony of Lee that "we had two small boats that we obtained on the bay shore, with sails and a sailing skiff we captured from two Union men. No boats were brought from Richmond or from any Confederate cruiser" (p. 20, Record). In the opinion of the court, the claim that these boats were tenders attached to the cruiser must fail, and with it the suggestion that the damage was done by the armed vessel through the instrumentality of boats attached to her.[1]

[1] "It may truly be said, in the words of Lord Stowell, when a ship takes by her boats or tender, she does all she could have done if present" (Sir C. Robinson, in *The Zepherina*, 1830, 2 Hagg. 318, 321). Other cases involving the question of "tenders" are: *The Odin*, 1803, 4 C. Rob. 318; *The Charlotte*, 1804, 5 C. Rob. 280. — Ed.

So far as being effective in this matter, the *Henry* might as well have been in the Arctic Ocean as over in the James River. Any other body of men to the same number might have done the same work. The force making the capture in this case received no support or assistance from any armed or credentialed war vessel. The difficulty which, it seems to the court, places the case outside of the provisions of the statute, is that the damage was done by the men alone, and not by a vessel, when the act contemplates only damages wrought by an authorized vessel fitted for belligerent operations upon the high seas.

The large amount of damages believed to have been suffered by the claimants, the conviction that the claim has much merit in it, the admirable manner in which it was presented, and the fact that the finding of the court is final, have combined to secure for this case much and most painstaking consideration. After such consideration the conclusion is irresistible that however meritorious it may be in itself, it is not such a claim as Congress intended to make provision for in enacting the statutes under which we are proceeding.

Judgment will be entered for the United States.

All concur.[1]

[1] The latter part of this opinion should be considered in connection with Part II. chapter 2.

The Bay of Fundy is considered, on the contrary, an open arm of the sea. (*The Schooner Washington*, per Bates, Umpire, in Report of the Commission of Claims, 1853, p. 170).

In the case of *Dunham* v. *Lamphere*, 1855, 3 Gray, 268, before the Supreme Court of Massachusetts, Shaw, C. J., said: "We suppose the rule to be that those limits extend a marine league, or three geographical miles, from the shore; and in ascertaining the line of shore this limit does not follow each narrow inlet or arm of the sea, but when the inlet is so narrow that persons and objects can be discerned across it by the naked eye, the line of territorial jurisdiction stretches across from one headland to the other of such inlet."

In *Mahler* v. *Transportation Co.*, 1866, 35 N. Y. 352, Long Island Sound was held to be part of New York State and subject to its jurisdiction.

In *Manchester* v. *Massachusetts*, 1890, 139 U. S. 240, the court held, after an elaborate survey of English and American authorities, that the jurisdiction of Massachusetts included the marine belt surrounding it; that Buzzard's Bay, falling within the principle of *Dunham* v. *Lamphere*, should be and is governed by it, thereby making Buzzard's Bay for jurisdictional purposes part of Massachusetts; that such bay, being within Massachusetts, that Commonwealth rightfully exercises all rights of ownership and possession, including fishing rights and privileges, therein; that in the absence of affirmative legislation on the part of Congress, vesting the regulation of fishing in such bays, State regulations, as in cases of pilot legislation, must remain with the State. Such bays therefore are not high seas in the sense of international law, and the apportionment of jurisdiction over such bodies of water between the respective States and the United States is a matter of municipal, not of international, law.

Shively v. *Bowlby*, 1893, 152 U. S. 1, is a remarkable case, — unfortunately too long to print, — in which the origin, nature and extent of jurisdiction of the United States

(*d*) *Marginal Seas.*

THE QUEEN v. KEYN.

COURT OF CROWN CASES RESERVED, 1876.

(*Law Reports*, 2 *Exchequer Division*, 63.)

The prisoner was indicted at the Central Criminal Court for the manslaughter of Jessie Dorcas Young on the high seas, and within the jurisdiction of the Admiralty of England. The deceased was a passenger on board the *Strathclyde*, a British steamer bound from London to Bombay. This vessel, when one and nine-tenths of a mile from Dover pier-head, and within two and a half miles from Dover beach, was run down and sunk by the *Franconia*, a German steamer. In the collision, the deceased woman was drowned, and the prisoner, the captain of the *Franconia*, is convicted of manslaughter; but a question of law is reserved.

An objection was taken on the part of the prisoner that, inasmuch as he was a foreigner, in a foreign vessel, on a foreign voyage, sailing upon the high seas, he was not subject to the jurisdiction of any court in this country.

The Crown contends that inasmuch as, at the time of the collision, both vessels were within the distance of three miles from the English shore, the offense was committed within the realm of England, and is triable by the English court.

The case was argued before Cockburn, C. J., Lord Coleridge, C. J., Kelly, C. B., Sir R. Phillimore, Bramwell, Pollock, and Amphlett, B. B., Lush, Brett, Grove, Denman, Archibald,[1] Field and Lindley, JJ.

COCKBURN, C. J;— "The question is, whether the accused is amenable to our law, and whether there was jurisdiction to try him?

"The legality of the conviction is contested, on the ground that the accused is a foreigner; that the *Franconia*, the ship he commanded, was a foreign vessel, sailing from a foreign port, bound on a foreign voyage; that the alleged offense was committed on the high seas. Under these circumstances, it is contended that the accused, though he may be amenable to the law of his own country, is not capable of being tried and punished by the law of England.

"The facts on which this defense is based are not capable of

and the States over navigable waters are carefully and exhaustively discussed. As it is in large part a digest-case, no short note of it can well be given. — ED.

[1] Archibald, J., died after the argument and before the judgment was delivered.

being disputed; but a twofold answer is given on the part of the prosecution:—1st. That, although the occurrence on which the charge is founded took place on the high seas in this sense that the place in which it happened was not within the body of a county, it occurred within three miles of the English coast; that by the law of nations, the sea, for a space of three miles from the coast, is part of the territory of the country to which the coast belongs; that, consequently, the *Franconia*, at the time the offense was committed, was in English waters, and those on board were therefore subject to English law.

"Secondly. That, although the negligence of which the accused was guilty occurred on board a foreign vessel, the death occasioned by such negligence took place on board a British vessel; and that, as a British vessel is, in point of law to be considered British territory, the offense, having been consummated by the death of the deceased in a British ship, must be considered as having been committed on British territory. * * *

"According to the general law, a foreigner who is not residing permanently or temporarily in British territory, or on board a British ship, cannot be held responsible for an infraction of the law of this country.

"Unless, therefore, the accused, Keyn, at the time the offense of which he has been convicted was committed, was on British territory or on board a British ship, he could not be properly brought to trial under British law, in the absence of express legislation. * * *

"In the reign of Charles II., Sir Leoline Jenkins, then the judge of the Court of Admiralty, in a charge to the grand jury at an Admiralty sessions at the Old Bailey, not only asserted the king's sovereignty within the four seas, and that it was his right and province 'to keep the public peace on these seas'—that is, as Sir Leoline expounds it, 'to preserve his subjects and allies in their possessions and properties upon these seas, and in all freedom and security to pass to and fro on them, upon their lawful occasions,' but extended this authority and jurisdiction of the King. 'To preserve the public peace and to maintain the freedom and security of navigation all the world over; so that not the utmost bound of the Atlantic Ocean, nor any corner of the Mediterranean, nor any part of the South or other seas, but that if the peace of God and the King be violated upon any of his subjects, or upon his allies or their subjects, and the offender be afterwards brought up or laid hold of in any of His Majesty's ports, such breach of the peace is to be inquired of and tried in virtue of a commission of oyer and terminer as this is, in such county, liberty, or place as His Majesty

shall please to direct—so long an arm hath God by the laws given to his vicegerent the King.' * * *

"Venice, in like manner, laid claim to the Adriatic, Genoa to the Ligurian Sea, Denmark to a portion of the North Sea.

"The Portuguese claimed to bar the ocean route to India and the Indian Seas to the rest of the world, while Spain made the like assertion with reference to the West.

"All these vain and extravagant pretensions have long since given way to the influence of reason and common sense.

"If, indeed, the sovereignty thus asserted had a real existence, and could now be maintained, it would of course, independently of any question as to the three-mile zone, be conclusive of the present case. But the claim to such sovereignty, at all times unfounded, has long since been abandoned. No one would now dream of asserting that the sovereign of these realms has any greater right over the surrounding seas than the sovereigns on the opposite shores; or that it is the especial duty and privilege of the Queen of Great Britain to keep the peace in these seas; or that the Court of Admiralty could try a foreigner for an offense committed in a foreign vessel in all parts of the Channel.

"No writer of our day, except Mr. Chitty in his treatise on the prerogative, has asserted the ancient doctrine. Blackstone, in his chapter on the prerogative in the Commentaries, while he asserts that the narrow seas are part of the realm, puts it only on the ground that the jurisdiction of the Admiralty extends over these seas.

"He is silent as to any jurisdiction over foreigners within them. The concensus of jurists, which has been so much insisted on as authority, is perfectly unanimous as to the non-existence of any such jurisdiction. Indeed, it is because this claim of sovereignty is admitted to be untenable that it has been found necessary to resort to the theory of the three-mile zone.

"It is in vain, therefore, that the ancient assertion of sovereignty over the narrow seas is invoked to give countenance to the rule now sought to be established, of jurisdiction over the three-mile zone.

"If this rule is to prevail, it must be on altogether different grounds. To invoke, as its foundation or in its support, an assertion of sovereignty which, for all practical purposes, is, and always has been, idle and unfounded, and the invalidity of which renders it necessary to have recourse to the new doctrine, involves an inconsistency, on which it would be superfluous to dwell. I must confess myself unable to comprehend how, when the ancient doctrine as to sovereignty over the narrow seas is adduced, its operation can be confined

to the three-mile zone. If the argument is good for anything, it must apply to the whole of the surrounding seas. But the counsel for the Crown evidently shrank from applying it to this extent. Such a pretension would not be admitted or endured by foreign nations. That it is out of this extravagant assertion of sovereignty that the doctrine of the three-mile jurisdiction, asserted on the part of the Crown, and which, the older claim being necessarily abandoned, we are now called upon to consider, has sprung up, I readily admit. * * *

"With the celebrated work of Grotius, published in 1609, began the great contest of the jurists as to the freedom of the seas. "The controversy ended, as controversies often do, in a species of compromise. While maintaining the freedom of the seas, Grotius, in his work *De Jure Belli et Pacis*, had expressed an opinion that, while no right could be acquired to the exclusive possession of the ocean, an exclusive right or jurisdiction might be acquired in respect of particular portions of the sea adjoining the territory of individual states. * * *

"Other writers adopted a similar principle, but with very varying views as to the extent to which the right might be exercised. Albericus Gentiles extended it to 100 miles; Baldus and Bodinus to sixty.

"Loccenius (*De Jure Maritimo*, ch. iv., s. 6) puts it at two days' sail; another writer makes it extend as far as could be seen from the shore. Valin, in his Commentary on the French Ordinances of 1681 (ch. v.), would have it reach as far as bottom could be found with the lead line. * * *

"Differing altogether from these writers as to the extent of maritime sovereignty, Bynkershoek, an advocate, like Grotius, for the *mare liberum*, and who entered the lists against Selden as to the dominion of England in the so-called English Sea, in his treatise *De Dominio Maris*, published in 1702, follows up the idea of Grotius as to a limited dominion of the sea from the shore. * * *

"After combating the doctrine of a *mare clausum* as regards the sea at large, and enumerating these inconsistent opinions, which he seems little disposed to respect, Bynkershoek continues: 'Hinc videas priscos juris magistros, qui dominium in mare proximum ausi sunt agnoscere, in regundis ejus finibus admodum vagari incertos.' 'Quare omnino videtur rectius,' he adds, after disposing of the foregoing opinions, 'Eo potestatem terræ extendi, quousque tormenta exploduntur; eatenus quippe, cum imperare, tum possidere videmur. Loquor autem de his temporibus; quibus illis machinis utimur; alioquin generaliter decendum esset, potestatem terræ finiri, ubi finitur armorum vis; etenim haec, ut diximus, possessionem tuetur.'

"We have here, for the first time, so far as I am aware, a suggestion as to a territorial dominion over the sea, extending as far as cannon-shot would reach—a distance which succeeding writers fixed at a marine league, or three miles. Prior to this, no one had suggested such a limit.

"The jurisdiction, assumed in the Admiralty commissions, or exercised by the Court of King's Bench in the time of the Edwards, was founded on the King's alleged sovereignty over the whole of the narrow seas; it had no reference whatever to any notion of a territorial sea. To English lawyers the idea of this limited jurisdiction was utterly unknown.

"With Selden and Hale, they stood up stoutly for the King's undivided dominion over the four seas. No English author makes any distinction, as regards the dominion of the Crown, between the narrow seas as a whole and any portion of them as adjacent to the shore. The doctrine was equally unknown to the Scotch lawyers. * * *

"Even to our times the doctrine of the three-mile zone has never been adopted by the writers on English law. To Blackstone who, in his Commentaries, treats of the sea with reference to the prerogative, as also to his modern editor, Mr. Stephen, it is unknown; equally so to Mr. Chitty, whose work on the prerogative is of the present century. It was not till the beginning of this century that any mention of such a doctrine occurs in the courts of this country. But to the continental jurists, the suggestion of Bynkershoek seemed a happy solution of the great controversy as to the freedom of the sea; and the formula, *potestas finitur ubi finitur armorum vis*, was a taking one; and succeeding publicists adopted and repeated the rule which their predecessor had laid down, without much troubling themselves to ascertain or inquire whether that rule had been recognized and adopted by the maritime nations who were to be affected by it. * * *

"But to what, after all, do these ancient authorities amount? Of what avail are they towards establishing that the soil in the three-mile zone is part of the territorial domain of the Crown? These assertions of sovereignty were manifestly based on the doctrine that the narrow seas are part of the realm of England. But that doctrine is now exploded. Who at this day would venture to affirm that the sovereignty thus asserted in those times now exists? What English lawyer is there who would not shrink from maintaining—what foreign jurist who would not deny—what foreign government which would not repel such a pretension? I listened carefully to see whether such an assertion would be made; but none was made.

No one has gone the length of suggesting, much less of openly asserting, that the jurisdiction still exists. It seems to me, that when the sovereignty and jurisdiction from which the property in the soil of the sea was inferred is gone, the territorial property which was suggested to be consequent upon it, must necessarily go with it. * * *

"It thus appearing, as it seems to me that the littoral sea beyond low-water mark did not, as distinguished from the rest of the high seas, originally form part of the territory of the realm, the question again presents itself, when and how did it become so? Can a portion of that which was before high sea have been converted into British territory, without any action on the part of the British government or legislature—by the mere assertions of writers on public law—or even by the assent of other nations?

"And when in support of this position, or of the theory of the three-mile zone in general, the statements of the writers on international law are relied on, the question may well be asked, upon what authority are these statements founded?

"When and in what manner have the nations, who are to be affected by such a rule as these writers, following one another, have laid down, signified their assent to it? to say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given.

"For, even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilized nations of the world.

"For writers on international law, however valuable their labors may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage,—an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to the local law as well as to that of their own country. In the absence of proof of assent, as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements. Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an Act

of Parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law, but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas.

"When I am told that all other nations have assented to such an absolute dominion on the part of the littoral state, over this portion of the sea, as that their ships may be excluded from it, and that, without any open legislation, or notice to them or their subjects, the latter may be held liable to the local law, I ask first what proof there is of such assent as here asserted; and, secondly, to what extent has such assent been carried; a question of infinite importance, when undirected by legislation, we are called upon to apply the law on the strength of such assent. It is said that we are to take the statements of the publicists as conclusive proof of the assent in question, and much has been said to impress on us the respect which is due to their authority, and that they are to be looked upon as witnesses of the facts to which they speak, witnesses whose statements, or the foundation on which those statements rest, we are scarcely at liberty to question. I demur altogether to this position. I entertain a profound respect for the opinion of jurists when dealing with the matters of judicial principle and opinion, but we are here dealing with a question not of opinion but of fact, and I must assert my entire liberty to examine the evidence and see upon what foundation these statements are based.

"The question is not one of theoretical opinion, but of fact, and, fortunately, the writers upon whose statements we are called upon to act have afforded us the means of testing those statements by reference to facts. They refer us to two things, and to these alone—treaties and usage.

"Let us look a little more closely into both.

"First, then, let us see how the matter stands, as regards treaties. It may be asserted, without fear of contradiction, that the rule that the sea surrounding the coast is to be treated as a part of the adjacent territory, so that the state shall have exclusive dominion over it, and that the law of the latter shall be generally applicable to those passing over it in the ships of other nations, has never been made the subject matter of any treaty, or, as matter of acknowledged right, has formed the basis of any treaty, or has ever been the subject of diplomatic discussion. It has been entirely the creation

of the writers on international law. It is true that the writers who have been cited, constantly refer to treaties in support of the doctrine they assert. But when the treaties they refer to are looked at, they will be found to relate to two subjects only—the observance of the rights and obligations of neutrality, and the exclusive right of fishing. In fixing the limits to which these rights should extend, nations have so far followed the writers on international law as to adopt the three miles range as a convenient distance. There are several treaties by which nations have engaged, in the event of either of them being at war with a third, to treat the sea within three miles of each other's coasts as neutral territory, within which no warlike operations should be carried on; instances of which will be found in the various treatises on international law. Thus for instance, in the treaties of commerce, between Great Britain and France, of September, 1786; between France and Russia of January, 1787; between Great Britain and the United States, of October, 1794, each contracting party engages, if at war with any other nation, not to carry on hostilities within cannon shot of the coast of the other contracting party; or, if the other should be at war, not to allow its vessels to be captured within the like distance. There are many other treaties of the like tenor, a list of which is given by Azuni (vol., II p. 78); and various ordinances and laws have been made by the different states in order to give effect to them.

"Again, nations, possessing opposite or neighboring coasts, bordering on a common sea, have sometimes found it expedient to agree that the subjects of each shall exercise an exclusive right of fishing to a given distance from their own shores, and here also have accepted the three miles as a convenient distance. Such, for instance, are the treaties made between this country and the United States, in relation to the fishery off the coast of Newfoundland, and those between this country and France, in relation to the fishery on their respective shores; and local laws have been passed to give effect to these engagements.

"But in all these treaties this distance is adopted, not as matter of existing right established by the general law of nations, but as matter of mutual concession and convention. Instead of upholding the doctrine contended for, the fact of these treaties having been entered into has rather the opposite tendency; for it is obvious that, if the territorial right of a nation bordering on the sea to this portion of the adjacent waters had been established by the common assent of nations, these treaty arrangements would have been wholly superfluous.

"Each nation would have been bound, independently of treaty engagement, to respect the neutrality of the other in these waters as much as in its inland waters. The foreigner invading the rights of the local fisherman would have been amenable, consistently with international law, to local legislation prohibiting such infringement, without any stipulation to that effect by treaty. For what object, then, have treaties been resorted to? Manifestly in order to obviate all questions as to concurrent or conflicting rights arising under the law of nations.

"Possibly, after these precedents and all that has been written on this subject, it may not be too much to say that, independently of treaty, the three-mile belt of sea might at this day be taken as belonging for these purposes, to the local state.

"But it is scarcely logical to infer, from such treaties alone, that, because nations have agreed to treat the littoral sea as belonging to the country it adjoins, for certain specified objects, they have therefore assented to forego all other rights previously enjoyed in common, and have submitted themselves, even to the extent of the right of navigation on a portion of the high seas, and the liability of their subjects therein to the criminal law, to the will of the local sovereign, and the jurisdiction of the local state. Equally illogical is it, as it seems to me, from the adoption of the three-mile distance in these particular instances, to assume, independently of everything else, a recognition, by the common assent of nations, of the principle that the subjects of one state passing in ships within three miles of the coast of another, shall be in all respects subject to the law of the latter. It may be that the maritime nations of the world are prepared to acquiesce in the appropriation of the littoral sea; but I cannot think that these treaties help us much towards arriving at the conclusion that this appropriation has actually taken place. At all events, the question remains, whether judicially we can infer that the nations who have been parties to these treaties, and, still further, those who have not, have thereby assented to the application of the criminal law of other nations to their subjects on the waters in question, and on the strength of such inference so apply the criminal law of this country.

"The uncertainty in which we are left, so far as judicial knowledge is concerned, as to the extent of such assent, likewise presents, I think, a very serious obstacle to our assuming the jurisdiction we are called upon to exercise, independently of the, to my mind, still more serious difficulty, that we should be assuming it without legislative warrant.

"So much for treaties. Then how stands the matter as to usage,

to which reference is so frequently made by the publicists in support of their doctrine?

"When the matter is looked into, the only usage found to exist is such as is connected with navigation, or with revenue, local fisheries, or neutrality, and it is to these alone that the usage relied on is confined. Usage as to the application of the general law of the local state to foreigners on the littoral sea, there is actually none. No nation has arrogated to itself the right of excluding foreign vessels from the use of its external littoral waters for the purpose of navigation, or has assumed the power of making foreigners in foreign ships passing through these waters subject to its law, otherwise than in respect of the matters to which I have just referred. Nor have the tribunals of any nation held foreigners in these waters amenable generally to the local criminal law in respect of offenses. It is for the first time in the annals of jurisprudence that a court of justice is now called upon to apply the criminal law of the country to such a case as the present.

"It may well be, I say again, that—after all that has been said and done in this respect—after the instances which have been mentioned of the adoption of the three-mile distance, and the repeated assertion of this doctrine by the writers on public law, a nation which should now deal with this portion of the sea as its own, so as to make foreigners within it subject to its law, for the prevention and punishment of offenses, would not be considered as infringing the rights of other nations. But I apprehend that as the ability so to deal with these waters would result, not from any original or inherent right, but, from the acquiescence of other states, some outward manifestation of the national will, in the shape of open practice or municipal legislation, so as to amount, at least constructively, to an occupation of that which was before unappropriated, would be necessary to render the foreigner, not previously amenable to our general law, subject to its control.

"That such legislation, whether consistent with the general law of nations or not, would be binding on the tribunals of this country —leaving the question of its consistency with international law to be determined between the governments of the respective nations— can of course admit of no doubt. The question is whether such legislation would not, at all events, be necessary to justify our courts in applying the law of this country to foreigners under entirely novel circumstances in which it has never been applied before. * * *

"It is unnecessary to the defense, and equally so to the decision of the case, to determine whether Parliament has the right

to treat the three-mile zone as part of the realm consistently with international law.

"That is a matter on which it is for Parliament itself to decide. It is enough for us that it has, so far as to be binding upon us, the power to do so. The question is whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation.

"I am clearly of opinion that we cannot, and that it is only in the instance in which foreigners on the sea have been made specifically liable to our law by statutory enactment that that law can be applied to them.* * *

"Hitherto, legislation, so far as relates to foreigners in foreign ships in this part of the sea, has been confined to the maintenance of neutral rights and obligations, the prevention of breaches of the revenue and fishery laws, and, under particular circumstances, to cases of collision.

"In the two first the legislation is altogether irrespective of the three-mile distance, being founded on a totally different principle, namely, the right of a state to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws. * * *

"It is apparent that, with the exception of the penalties imposed for violation of neutral duties or breaches of the revenue or fishery laws, there has been no assertion of legislative authority in the general application of the penal law to foreigners within the three-mile zone. The legislature has omitted to adopt the alleged sovereignty over the littoral sea, to the extent of making our penal law applicable generally to foreigners passing through it for the purpose of navigation. Can a court of justice take upon itself, in such a matter, to do what the legislature has not thought fit to do—that is, make the whole body of our penal law applicable to foreign vessels within three miles of our coast?

"It is further apparent from these instances of specific legislation that, when ascertaining its power to legislate with reference to the foreigner within the three-mile zone, Parliament has deemed it necessary, wherever it was thought right to subject him to our law, expressly to enact that he should be so. We must take this, I think, as an exposition of the opinion of Parliament that specific legislation is here necessary, and consequently, that without it the foreigner in a foreign vessel will not come within the general law of this country in respect of matters arising on the sea.

"Legislation, in relation to foreign ships coming into British ports

and waters, rests on a totally different principle, as was well explained by Dr. Lushington, in the case of *The Annapolis*.[1]

"'The Parliament of Great Britain it is true,' says Dr. Lushington, 'has not, according to the principles of public law, any authority to legislate for foreign vessels on the high seas, or for foreigners out of the limits of British jurisdiction; though, if Parliament thought fit so to do, this court, in its instance jurisdiction at least, would be bound to obey. In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of international law, and the construction has been accordingly.

"'Within, however, British jurisdiction, namely, within British territory, and at sea within three miles from the coast, and within all British rivers *intra fauces*, and over foreigners in British ships, I apprehend that the British Parliament has an undoubted right to legislate. I am further of opinion that Parliament has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports, and that if they do enter they shall be subject to penalties, unless they have previously complied with the requisitions ordained by the British Parliament whether those requisitions be, as in former times, certificates of origin, or clearance of any description from a foreign port, or clean bills of health, or the taking on board a pilot at any place in or out of British jurisdiction before entering British waters.

"'Whether the Parliament has so legislated is now the question to be considered.' * * *

"In the result, looking to the fact that all pretension to sovereignty or jurisdiction over foreign ships in the narrow seas has long since been wholly abandoned—to the uncertainty which attaches to the doctrine of the publicists as to the degree of sovereignty and jurisdiction which may be exercised on the so-called territorial sea—to the fact that the right of absolute sovereignty therein, and of penal jurisdiction over the subjects of other states, has never been expressly asserted or conceded among independent nations, or, in practice, exercised, and acquiesced in, except for violation of neutrality or breach of revenue or fishery laws, which, as has been pointed out, stand on a different footing as well as to the fact that, neither in legislating with reference to shipping, nor in respect of the criminal law, has Parliament thought proper to assume territorial sovereignty over the three-mile zone, so as to enact that all offenses committed upon it, by foreigners in foreign ships, should be within the criminal law of this country, but, on the contrary, wherever it

[1] Lush. Adm. 295.

was thought right to make the foreigner amenable to our law, has done so by express and specific legislation. I cannot think that, in the absence of all precedent, and of any judicial decision or authority applicable to the present purpose, we should be justified in holding an offense, committed under such circumstances, to be punishable by the law of England, especially as in so holding we must declare the whole body of our penal law to be applicable to the foreigner passing our shores in a foreign vessel on his way to a foreign port. * * *

"Having arrived at this conclusion, it becomes necessary to consider the second point taken on the part of the Crown, namely, that though the negligence of which the accused was guilty occurred on board a foreign ship, yet, the death having taken place on board a British ship, the offense was committed within the jurisdiction of a British court of justice. * * *

"The question is—and this appears to me to have been lost sight of in the argument—not whether the death of the deceased, which no doubt took place in a British ship, was the act of the defendant in such ship, but whether the defendant, at the time the act was done, was himself within British jurisdiction.

"But in point of fact, the defendant was, at the time of the occurrence, not on board the British ship, the *Strathclyde*, but on a foreign ship, the *Franconia*. * * *

"But in order to render a foreigner liable to the local law, he must, at the time the offense was committed, have been within British territory if on land, or in a British ship if at sea. I cannot think that if two ships of different nations met on the ocean, and a person on board of one of them were killed or wounded by a shot fired from the other, the person firing it would be amenable to the law of the ship in which the shot took effect."

Lush, J., said, in part: "In the reign of Richard II., the realm consisted of the land within the body of the counties. All beyond low-water mark was part of the high seas.

"At that period the three-mile radius had not been thought of. International law, which, upon this subject at least, has grown up since that period, cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament. As no such act has been passed, it follows that what was out of the realm then is out of the realm now, and what was part of the high seas then is part of the high seas now; and upon the high seas the Admiralty jurisdiction was confined to British ships. Therefore, although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they

are out of the realm, and any exercise of criminal jurisdiction over a foreign ship in these waters must in my judgment be authorized by an Act of Parliament."

Lord COLERIDGE, C. J., dissenting from the opinion of the majority, said, in part * * * "But, first, I think the offense was committed within the realm of England; and if so, there was jurisdiction to try it. * * *

"Now the offense was committed much nearer to the line of low-water mark than three miles; and therefore, in my opinion, upon English territory. I pass by for the moment the question of the exact limit of the realm of England beyond low-water mark, I am of opinion that it does go beyond low-water mark; and if it does, no limit has ever been suggested which would exclude from the realm the place where this offense was committed. But for the difference of opinion of the Bench, and for the great deference which is due to those who differ from me, I should have said it was impossible to hold that England ended with low-water mark. I do not of course forget that it is freely admitted to be within the competency of Parliament to extend the realm how far soever it pleases to extend it by enactments, at least so as to bind the tribunals of the country; and I admit equally freely that no statute has in plain terms, or by definite limits, so extended it.

"But, in my judgment, no Act of Parliament was required. The proposition contended for, as I understand, is that for any act of violence committed by a foreigner upon an English subject within a few feet of low-water mark, unless it happens on board a British ship, the foreigner cannot be tried, and is dispunishable. * * *

"By a consensus of writers, without one single authority to the contrary, some portion of the coast-waters of a country is considered for some purposes to belong to the country the coasts of which they wash. * * *

"This is established as solidly, as, by the very nature of the case, any proposition of international law can be. Strictly speaking, international law is an inexact expression and it is apt to mislead if its inexactness is not kept in mind. Law implies a law-giver, and a tribunal capable of enforcing it and coercing its transgressors.

"But there is no common law-giver to sovereign states and no tribunal has the power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and

acts of state are but evidence of the agreement of nations, and do not in this county at least *per se* bind the tribunals. Neither, certainly does a consensus of jurists; but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English courts give effect, as part of English law, to such agreement. * * *

"We find a number of men of education, of many different nations, most of them uninterested in maintaining any particular thesis as to the matter now in question, agreeing generally for nearly three centuries in the proposition that the territory of a maritime country extends beyond low-water mark.

"I can hardly myself conceive stronger evidence to show that, as far as it depends on the agreement of nations, the territory of maritime countries does so extend. * * *

"If the matter were to be determined for the first time, I should not hesitate to hold that civilized nations had agreed to this prolongation of the territory of maritime states, upon the authority of the writers who have been cited in this argument as laying down the affirmative of this proposition. * * *

"Furthermore, it has been shown that English judges have held repeatedly that these coast waters are portions of the realm. It is true that this particular point does not seem ever distinctly to have arisen. But Lord Coke, Lord Stowell, Dr. Lushington, Lord Hatherley, L. C., Erle, C. J., and Lord Wensleydale (and the catalogue might be largely extended) have all, not hastily, but in writing, in prepared and deliberate judgments, as part of the reasoning necessary to support their conclusions, used language, some of them repeatedly, which I am unable to construe, except as asserting, on the part of these eminent persons, that the realm of England, the territory of England, the property of the state and Crown of England over the water and the land beneath it, extends at least so far beyond the line of low water on the English coast, as to include the place where this offense was committed. * * * The English and American text writers, and two at least of the most eminent American judges, Marshall and Story, have held the same thing.

"Further—at least in one remarkable instance—the British Parliament has declared and enacted this to be the law. In the present reign two questions arose between Her Majesty and the Prince of Wales as to the property in minerals below high-water mark around the coast of Cornwall. The first question was as to the property in minerals between high and low-water mark around the coasts of that county; and as to the property in minerals below low-water mark won by an extension of workings begun above low-water mark.

"The whole argument on the part of the Crown was founded on the proposition that the *fundus maris* below low-water mark, and therefore beyond the limits of the county of Cornwall, belonged in property to the Crown. The Prince was in possession of the disputed mines; he had worked them from land undoubtedly his own; and, therefore, unless the Crown had a right of property in the bed of the sea, not as first occupier—for the Prince was first occupier, and was in occupation—the Crown must have failed. * * * Sir John Patterson * * * thus expressed himself.—'I am of opinion, and so decide, that the right to the minerals below low-water mark remains and is vested in the Crown, although those minerals may be won by workings commenced above low-water mark and extended below it,' and he recommended the passing of an Act of Parliament to give practical effect to his decision, so far as it was in favor of the crown. The Act of Parliament accordingly was passed, the 21 & 22 Vict. c. 109.

"We have therefore, it seems, the express and definite authority of Parliament for the proposition that the realm does not end with low-water mark, but that the open sea and the bed of it are part of the realm and of the territory of the sovereign. If so, it follows that British law is supreme over it, and that the law must be administered by some tribunal. It cannot, for the reasons assigned by my Brother Brett, be administered by the judges of oyer and terminer; it can be, and always could be, by the Admiralty, and if by the Admiralty, then by the Central Criminal Court."

The Court quashed the conviction.

The majority of the Court was composed of Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush and Field, JJ., Sir R. Phillimore and Pollock, B.—Lord Coleridge, C. J., Brett, and Amphlett, J. A., Grove, Denman and Lindley, JJ., dissenting.[1]

[1] On account of the extreme length of the opinion of the Lord Chief Justice, a considerable part of it—and a part interesting and valuable—has been necessarily omitted. This is true notably of that portion consisting of the analysis of cases, and of the abstract of the opinions of text writers. It is regretted, too, that the opinions of the other judges cannot be given.

For criticisms of the judgment in this case, see Stephen's History of the Criminal Law, II., 29–42; Maine's International Law, p. 38; Judge Foster, in the Am. Law Rev., July, 1877; Walker's Science of International Law, p. 173.

In consequence of the decision in this case, an act was passed in the session of 1878 (41 and 42 Vict. c. 73), which would seem to adopt the view of the minority of the court. The preamble declares that "the rightful jurisdiction of her Majesty, her heirs and successors extends and has always extended over the open seas adjacent to the coasts of the United Kingdom, and of all other parts of her Majesty's dominions to such a distance as is necessary for the defense and security of such dominions," and that "it is expedient that all offenses committed in the open sea within a certain distance of the coasts of the United Kingdom and of all other parts

CHAPTER II.

TERRITORIAL JURISDICTION.

Section 7. — Rights, Privileges and Immunities of Foreign Sovereigns.

(*a*) *Right of Foreign Sovereign to sue in Courts of Foreign State.*

THE REPUBLIC OF MEXICO v. FRANCISCO DE ARRANGOIZ, AND OTHERS.

Supreme Court of the City of New York, 1855.

(11 *Howard's Practice Reports*, 1.)

Hoffman, Justice. The defendant, Francisco de Arrangoiz, having been arrested under an order made by one of the justices of this court, and given bail to the amount of $60,000, now applies to be discharged upon the insufficiency of the affidavit on which the order was granted, and upon further affidavits and documents on his own part.

The first question relates to the form of the undertaking given upon the arrest, and this materially depends upon the correct understanding of the position of the plaintiff upon the record.

The right of a foreign sovereign to sue in the courts of England, upon which Lord Thurlow entertained doubts, has been fully settled and sustained. In the case of *The King of Spain* v. *Machado*, 4 Russell, 560, and 1 Bligh, N. S. 60, Lord Redesdale speaks of it as one of

of her Majesty's dominions, by whomsoever committed, should be dealt with according to law."

The act is entitled the Territorial Waters Jurisdiction Act, 1878; and enacts that,

"An offense committed by a person, whether he is or is not a subject of her Majesty, on the open sea within the territorial waters of her Majesty's dominions, is an offense within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offense may be arrested, tried, and punished accordingly.

"But no proceedings under this act are to be instituted against a foreigner, without the consent and certificate of a Secretary of State, or in the case of a colony, the certificate of the Governor.

"The Territorial waters of her Majesty's dominions, in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of her Majesty; and for the purpose of any offense declared by this act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of her Majesty's dominions." — Ed.

the clearest cases that could be stated: "That he sues as a sovereign, either on his own behalf, or on behalf of his subjects." See, also, *The Nabob of the Carnatic* v. *East India Company*, 1 Vesey, jr., 371; *The King of Hanover* v. *Wheatley*, 4 Beavan, 78; *Hullett* v. *The King of Spain*, 2 Bligh, N. S. 31, and 1 Clark & Finnelly, 33.

It will be seen, that in all the English cases in which the right to sue has been admitted, the plaintiff was a *monarch*, and was treated as an *individual*. The case of *The City of Berne* v. *The Bank of England*, 9 Vesey, 348, was decided upon the point of the State not having been recognized by the British government. It is also to be noticed that the bill was by a common councilman, on behalf of himself and his associates in the government. This appears from the report of the case of *Dolder* v. *The Bank of England*, 10 Vesey, 353; and in *Dolder* v. *Huntingfield*, 11 Vesey, 283, the suit was by individuals describing themselves as Llandamman and two Statholders of the Helvetic Republic, in whom the executive power was vested by the constitution.

When the case of *The King of Spain* v. *Machado* was first before the court, it was held that two persons, the agents of the king, and to whom he had given a power of attorney to collect and deposit the funds, but who had no interest in the amount, could not be joined with the king as co-plaintiffs. 4. Russell's Rep. 255.

The case of the *Colombian Government* v. *Rothschild*, 1 Simons' Rep. 103, is of importance in ascertaining the English rule, not merely because it was decided by a very able judge (Sir John Leach), but that it has received the sanction of Lord Eldon, Lord Redesdale, and Lord Brougham. (Compare the report in the House of Lords in 1 Dow. & Clark, with that in 1 Clark & Finnelly, 33.)

The bill was, in form, by the government of the State of Colombia, and Don Manuel T. Hutado, a citizen of such state, and minister plenipotentiary from the same to the court of his Britannic majesty, the place of his residence stated. On general demurrer, it was held that the bill could not be sustained. The vice-chancellor said, that a foreign state is as well entitled to the aid of the court, in asserting its rights, as any individual; but it must sue in a form that makes it possible for the court to do justice to the defendants. It must sue in the name of some public officers, who are entitled to sue in the name of the state, and upon whom process can be served on the part of the defendants, and who can be called upon to answer a cross-bill. The general description of the Colombian government precluded the defendants from these just rights, and no instance could be stated in which the court had entertained the suit of a foreign state, by such a description.

The English authorities appear to settle these points. That the sovereign of a foreign state may sue in the tribunals of the realm, but he sues as an individual. An action cannot be sustained in the name of his agent, although they may be empowered to act in the identical business. He is the party in interest. He must swear to answer a cross-bill, if one is required. He would be the party to be examined personally, whenever such an examination was warranted by the rules of the court.

Again: If a State sues, without the individuality of a monarch, some public officer representing it must be upon the record; and it seems that a minister plenipotentiary is not such an officer.

I cannot think that an examination of the old cases, referred to by counsel in *The Nabob of the Carnatic* v. *The East India Company*, will tend to prove that an ambassador may sustain an action on behalf of his sovereign, notwithstanding the doubts of Lord Rosslyn upon the subject. 3 Vesey, 431.

In *The King of Spain* v. *Oliver*, 1 Peter's C. C. Rep. 217, 276, an action for the recovery of duties, alleged to be payable to the Crown, was brought in the circuit court, and decided upon its merits. It appears that an application was made for a continuance, to take testimony under a commission, upon the affidavit of the Spanish minister.

These are all the authorities I have been able to find upon the subject; and I believe the question is entirely new in our country. The principle which pervades the English cases is marked by that spirit of equality and justice which is the inmate of English tribunals, and that principle places the sovereign and the peasant on the same footing.

But the reason of the English rule lies deeper. It has its origin in that leading doctrine of European policy which, in the language of Guizot, places "the personification of the state in the institution of monarchy." This embodiment of the commonwealth in the individual has given way, over the continent of America, to the idea of the concentration of the power in the people in an abstraction. Legitimate sovereignty does not find its representative in a king with his personality, but in a republic with its idealism.

Still there is the same brotherhood and communion of states to be recognized. The same family of nations, though with different names and different forms, exist; and their rights, and their responsibilities, must be forever the same. The catholic law of nations is identical in its application to all.

We must, then, admit these recognized governments to sue in our courts under their federative title, and adapt our forms of proceeding,

if possible, so as to do justice to all parties; or we must allow an individual representative, clothed with competent authority from his government, to act on its behalf, and thus have a party on the record who can be strictly subjected to those forms.

In my opinion, the action can be maintained in the name of the republic as an aggregate body; and the modes of proceeding in cases of foreign corporations, and of other States of the Union, may be resorted to for the regulations of the practice.

Before the Revised Statutes had embodied the law into an express provision, Chancellor Kent had decided that a foreign corporation could file a bill in our Court of Chancery, as well as sustain a suit at law. *Silver Lake Bank of Pennsylvania* v. *North*, 4 John. C. R. 371. Such a suit was brought in this court in *The Holyoke Bank* v. *Hastings*, 4 Sandf. Rep. 675.

Our highest court has also settled, that either of the States of the Union may sue in our State courts; and difficulties of practice are not found insuperable. *State of Illinois* v. *Delafield*, 2 Hill, 159, 8 Paige, 527; *State of Indiana* v. *Woram*, 6 Hill, 36.

With these views, I consider the objection to the undertaking not tenable. The language of the Code admits of the court treating an undertaking, signed by an admitted agent of a foreign government appointed to sue, to be an undertaking on the part of the plaintiff. In the case of *Richardson* v. *Crary*, 1 Duer, 666, referred to by the counsel of the defendant, the instrument was executed by sureties alone; neither by the plaintiff nor by any one on his behalf.[1]

PRIOLEAU v. UNITED STATES AND ANDREW JOHNSON.

In Equity, 1866.

(*Law Reports*, 2 *Equity*, 659.)

This was a cross-bill to a suit of *United States* v. *Prioleau*. (*Supra*, § 5, a.)

The original suit was instituted by the United States of America suing in their corporate capacity to establish their rights to cotton shipped at Galveston, Texas, during the rebellion and consigned to the defendants, for sale in England for the benefit of the *de facto* Con-

[1] Remainder of opinion omitted. Affirmed on appeal 5 Duer, 634.

In *King of Prussia* v. *Küpper*, 1856, 22 Mo. 550, citing with approval the principal case, it was held that a foreign sovereign could sue in a Missouri court, and that such sovereign may be plaintiff in either State or Federal courts. —Ed.

federate Government. The United States, as plaintiffs, moved for an injunction to restrain the defendants from obtaining possession of the cotton from the Dock and Harbor Board, and from dealing with it otherwise than under the direction of the plaintiffs, who claimed it as State property to which they had succeeded on the dissolution of the so-called Confederate Government.

The Vice-Chancellor made an order appointing Mr. Prioleau receiver of the cotton under bond of £20,000. Messrs. Prioleau filed this cross-bill against the United State of America and President Andrew Johnson, for the purpose of obtaining discovery in reference to the matters in question in the suit.

No answer having been put in by President Johnson, the plaintiffs in the cross-suit moved that the time for closing the evidence in the first suit might be enlarged until one month after the defendants to the cross-bill had put in their answer, and that, failing such answer, the receivership of Prioleau might be discharged and his recognizances vacated.

The following are extracts from the opinion of Vice-Chancellor Sir W. PAGE WOOD:—

"The question in this case is one in some degree novel, but the general principles applicable to it are sufficiently established. The only difficulty in the present case is the particular mode selected by the plaintiffs in the cross-suit for arriving at the object they have in view. A bill being filed by the United States of America, under that description, against the defendants, a cross-bill is filed by the defendants for the purpose of obtaining discovery. They cannot, of course, obtain discovery upon oath from a body which is corporate —it is difficult to know how to express its position. It is not a corporation, strictly speaking, but it is a body so far corporate as not to present to the court as a suitor any one individual. Where the suitor is an individual, although he may be the sovereign of a foreign country, and may of himself in reality represent the whole country of which he is sovereign, this court has refused to acknowledge him when he comes here as a suitor in any other capacity than as a private individual. It has been determined by the highest authority that he must conform to the practice and regulations for administration of justice of the tribunals to which he resorts for relief; and among other things * * * he is obliged to answer upon oath. It is also established * * * that all persons sued in this country as a body corporate are amenable to the process of the court, and must answer by one or other of their officers upon oath, inasmuch as it is considered essential to justice that answers shall be made upon oath. * * * Now it is quite impossible, on any principle

of analogy, to say that the President has been properly selected, or that he is the person for whose answer upon oath the United States must wait before they proceed in their original suit. * * * Now the selection of the President of the United States is open at once to this objection, that the court cannot take judicial notice—nor do I suppose it is a matter of fact—that the United States Government have control over their President or can compel him to produce papers or the like, and therefore I cannot make any order that the proceedings in the original suit be stayed until the President has put in his answer. * * *

"I can do no more than make an order staying proceedings until the answer of the United States is put in."

UNITED STATES OF AMERICA v. WAGNER.

COURT OF APPEALS IN CHANCERY, 1867.

(*Law Reports*, 2 *Chancery Appeals*, 582.)

The bill in this suit was filed by "The United States of America" against agents of the Confederacy, doing business at Liverpool.

The bill alleges that the defendants had large quantities of cotton consigned to them—that in 1865 the rebellion was suppressed and that all the property held by the government of the so-called Confederate States, including all moneys, goods and ships in the power of the defendants, had vested in the plaintiffs. The bill prayed for an account, and for an order of payment of the money in the hands of the defendants, and a delivery of the goods and cotton in their hands. The defendants demurred generally, objecting that the bill should put forward the President of the United States or some state officer, upon whom process might be served, and who might answer a cross-bill.

The demurrer was allowed and now the plaintiffs appeal.[1]

The opinion of Lord CAIRNS, L. J., is as follows:—

"It is admitted that, upon the statements in the bill, it must be taken that the property claimed in the suit belongs to the United States of America, a foreign sovereign State, adopting the republican form of government, and recognized and treated with as such, and under that style, by Her Majesty; but it is contended that this foreign State, being a republic, cannot sue in its own name,

[1] Statement by the editor.

and must either associate with it as plaintiff, or proceed in the name of the President of the Republic, or some other officer of state.

"A proposition so startling, so grave in its consequences, and in such apparent antagonism to the rules, that the proper plaintiff is to be sought in the owner of the subject matter of the suit, and that a foreign State is at liberty to sue in any of our courts, would seem to require some argument and authority to support it. It was contended then, that when a monarch sues in our courts, he sues as the representative of the State of which he is the sovereign; that the property claimed is looked upon as the property of the people or State and that he is permitted to sue, not as for his own property, but as the head of the executive government of the State to which the property belongs: and it was contended, in like manner, that when the property belongs to a republic, the head of the executive, or in other words the President, ought to sue for it.

"This argument, in my opinion, is founded on a fallacy. The sovereign, in a monarchical form of government, may, as between himself and his subjects, be a trustee for the latter, more or less limited in his powers over the property which he seeks to recover. But in the courts of Her Majesty, as in diplomatic intercourse with the government of Her Majesty, it is the sovereign, and not the State, or the subjects of the sovereign, that is recognized. From him, and as representing him individually, and not his State or kingdom, is an ambassador received. In him individually, and not in a representative capacity is the public property assumed by all other States, and by the courts of other States, to be vested. In a republic, on the other hand, the sovereign power, and with it the public property, is held to remain and to reside in the State itself, and not in any officer of the State. It is from the State that an ambassador is accredited, and it is with the State that the diplomatic intercourse is conducted.

"It was then contended that the republic of the United States as a body politic, being plaintiff, no effectual discovery could be had from it, or relief against it, on a cross-bill; that it is a condition of obtaining relief in equity, that discovery may be had against the plaintiff on a cross-bill filed by the defendant; and that in the case of a corporation, this right is preserved by the rule that its officers may be made co-defendants for discovery.

"It is to be observed, however, with regard to the case of a corporation, where the court making an exception from its general rules allows persons who are merely witnesses to be made co-defendants for discovery, that the exception does not depend on any reasons springing out of the nature of bills and cross-bills; for the

officers of a corporation may be sued with the corporation, even where no litigation has been commenced by the corporation; nor does the liability of the officers to discovery affect the question who is to be plaintiff; for the corporation sues for the corporate property without joining any officer of the corporation as a co-plaintiff.

"The rule of the court as to corporations, if it proves anything, would seem to show that in a cross-bill against the United States, there would be a right to join some officer of the United States for the purpose of discovery.

"The Vice-Chancellor appears to have thought that the President of the United States was not an officer who could thus be joined as a defendant, and I do not desire to express an opinion differing in that respect from the opinion of his Honor. But if the reference to suits against corporations does not establish a right to make some officer of the United States a co-defendant to a cross bill, it is, as I think, altogether irrelevant. It is, however, in my opinion, an error to suppose that the right of a plaintiff to sue depends in any way on the effectiveness of the discovery which on a cross-bill can be exacted from him. From an infant, a lunatic, a representative, trustee, or executor, wholly ignorant of the occurrences which are the subjects of the suit, no practical discovery can be obtained, and yet they can maintain a suit.

"I apprehend that the only rule is, that the person, State, or corporation which has the interest must be the plaintiff, and the court will do the best the law admits of to secure to the defendant such defensive discovery and relief as he may be entitled to. The court can in all cases suspend relief on the original bill until justice is in this respect done to the defendant.

"The case of the *Columbian Government* v. *Rothschild*, 1 Sim., 94, however, was said to be, and the Vice-Chancellor appears to have considered that it was, a binding authority against a suit in this form. I cannot so view that case. The bill was filed in the name of the State of Columbia, and if this bill had been filed in the name of the Government of the United States, the case would have been analagous. Dealing with the words before him, Sir John Leach appears to have held, and to have most properly held, that an unknown and undefined body, such as the government of a State, could not sue by that quasi-corporate name, and the expressions in his judgment seem to me to intimate no more than that if the persons so described could sue at all they must come forward as individuals, and show that they were entitled to represent their State.

"Nothing could be more unreasonable than to suppose that by observations of this kind Sir John Leach meant to decide for the

first time, that a republic could not sue in its own name, but must have, or must create, some officer to maintain a suit on its behalf.

"I think the demurrer in this case must be overruled." [1]

THE SAPPHIRE.

Supreme Court of the United States, 1870.

(11 *Wallace*, 164.)

Mr. Justice Bradley delivered the opinion of the court.

The first question raised is as to the right of the French Emperor to

1 Other cases bearing upon the subject of this section are: *The King of Spain* v. *Hullet and Widder*, 1 Clarke and Finnelly, 348 (1833):—Don Justo José de Machado was appointed by the Spanish government to receive money for that government due from France. Upon receiving it, Machado brought the money to England and deposited a considerable portion of it with the defendants. The King of Spain applied to Machado for the money, but this demand was refused, whereupon the King brought a bill for discovery and for payment of the money into court, against Machado (who was out of the jurisdiction). The bill was demurred to for lack of parties, etc., but the demurrer was overruled, and the defendants appealed, mainly on the ground that it had never been held that a foreign sovereign could sue in courts of equity in England, and on principle such suit should not be allowed. This appeal was dismissed. Fifteen days later, the defendants filed a cross-bill in Chancery, the rules of which court compel the identical plaintiff in the original bill to himself swear to his answer to a cross-bill. The plaintiff asked to put in an answer either by his agent, or without oath or signature.

The House of Lords refused to deviate from the practice of the court.

Rothschild v. *Queen of Portugal*, 3 Younge and Collyer 594, (1839):—The bill was brought for discovery from the Queen of Portugal, as to matters stated in the bill, and for a commission to examine witnesses in Portugal, and for an injunction to restrain an action commenced against the plaintiff by the Queen of Portugal. This action was in contract, the Queen suing Messrs. Rothschild on some bonds deposited with them. The present plaintiffs now seek by this bill for discovery of certain correspondence and other matters to aid them in their defence.

The Queen demurs to the bill on two grounds, (1) that as a sovereign, the suit was not maintainable against her—(2) that the plaintiffs had made no case for discovery.

The first point only is considered.

The court overruled the demurrer, and, in the course of its decision, Baron Alderson said: "I am therefore of opinion that Her Most Faithful Majesty being a suitor voluntarily in a court of English law, becomes subject, as to all matters connected with that suit, to the jurisdiction of the Court of Equity."

[1] In *Emperor of Austria* v. *Day & Kossuth*, 1861, 2 Giff. 628, a foreign sovereign's right to sue was discussed with great learning, especially in Sir Hugh Cairns' argument for the plaintiff (665–675). On appeal, the judgment of Vice-Chancellor Stuart granting the injunction was affirmed by the House of Lords in 3 De Gex., F. & J. 217. The opinion of Lord Justice Turner is especially valuable — Ed.

sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the king of Spain in the third circuit by Justice Washington and Judge Peters in 1810.[1] The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and *foreign states*, citizens, or subjects, without reference to the subject-matter of the controversy. Our own Government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit.[2]

The next question is, whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the *Euryale*, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our Government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such inures to his successor in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power

[1] *King of Spain* v. *Oliver*, 2 Washington's Circuit Court, 431

[2] *King of Spain* v. *Hullett*, 1 Dow & Clarke, 169; S. C., 1 Clark & Finnelly, 333; S. C., 2 Bligh, N. S., 31; *Emperor of Brazil*, 6 Adolphus & Ellis, 801; *Queen of Portugal*, 7 Clark & Finnelly, 466; *King of Spain*, 4 Russell, 225; *Emperor of Austria*, 3 De Gex, Fisher & Jones, 174; *King of Greece*, 6 Dowling's Practice Cases, 12; S. C., 1 Jurist, 914; United States Law Reports, 2 Equity Cases, 659; Ditto, Ib. 2 Chancery Appeals, 582; *Duke of Brunswick* v. *King of Hanover*, 6 Beavan, 1; S. C., 2 House of Lords Cases, 1; *De Haber* v. *Queen of Portugal*, 17 Q. B. 169; also 2 Phillimore's International Law, part vi, chap. i; 1 Daniel's Chancery Practice, chap. ii, § 2.

to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the *Euryale* has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French nation.

If a special case should arise in which it could be shown that injustice to the other party would ensue from a continuance of the proceedings after the death or deposition of a sovereign, the court, in the exercise of its discretionary power, would take such order as the exigency might require to prevent such a result.

The remaining question relates to the merits of the case.

(*b*) *Immunity of Foreign Sovereigns from Suit.*

DE HABER v. QUEEN OF PORTUGAL.

QUEEN'S BENCH, 1851.

(17 *Queen's Bench*, 196.)

The plaintiff commenced an action of debt in the court of the Lord Mayor of London against the Queen of Portugal. It appears that he brought action for 12,136*l* sterling which he had left in the hands of Ferreiri, a Lisbon banker and which Ferreiri paid over to the Portuguese Government. The plaintiff, proceeding according to the custom of foreign attachment in London, sent out a summons for the defendant to appear. The defendant being called and not appearing, the plaintiff alleged that Senhor *Guilherne Candida Xavier De Brito*, of London, the garnishee had money and effects of the defendant in his hands, and prayed to attach the defendant by that money. The judge awarded an attachment as prayed.[1]

The judgment of the court was delivered by CAMPBELL, C. J. :— * * * "Notwithstanding the dictum of *Bynkershoek*, and the outlawry of the King of Spain, supposed to be related by Selden, we cannot doubt that the awarding of the attachment in the present case by the Lord Mayor's Court was an excess of jurisdiction, on the ground that the defendant is sued as a foreign potentate. * * * We have now to consider whether we can grant the prohibition on the application of the Queen of Portugal before she appears in the Lord Mayor's Court. The plaintiff's counsel argue that, before she can be heard, she must appear and be put in bail, in the alternative, to pay

[1] Short statement substituted for that of the reporter. — ED.

or to render. It would be very much to be lamented if, before doing justice to her, we were obliged to impose a condition upon her which would be a further indignity, and a further violation of the law of nations. If the rule were that the application for a prohibition can only be by the defendant after appearance, we should have had little scruple in making this an exception to the rule. But we find it laid down in books of the highest authority that, where the court to which the prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a *stranger*, as well as of the defendant himself.

"Therefore this court, vested with the power of preventing all inferior courts from exceeding their jurisdiction to the prejudice of the Queen or her subjects, is bound to interfere when duly informed of such an excess of jurisdiction. What has been done in this case by the Lord Mayor's Court must be considered as peculiarly in contempt of the Crown, it being an insult to an independent sovereign, giving that sovereign just cause of complaint to the British Government, and having a tendency to bring about a misunderstanding between our gracious Sovereign and her ally the Queen of Portugal.

"Therefore, upon the information and complaint of the Queen of Portugal, either as the party grieved, or as a *stranger*, we think we are bound to correct the excess of jurisdiction brought to our notice, and to prohibit the Lord Mayor's Court from proceeding further in this suit.

"Rule absolute for a prohibition."[1]

[1] In *Munden* v. *Duke of Brunswick*, 1847, 10 Q. B. 655, it was held insufficient to state that defendant was sovereign at time of contracting the obligation: it must be stated that sovereign is sovereign at time of suit filed or of the plea pleaded.

In *Strousberg* v. *Republic of Costa Rica* (1881), 44 Law Times. 199, James, L. J., lays down two exceptions to rule that sovereign may not be sued. "One is that, 'where a foreign sovereign or state comes into the municipal courts of this country for the purpose of obtaining a remedy, then by way of defence to that proceeding — by way of counter claim if necessary to the extent of defeating that claim — the person sued here may file a cross-claim, or take any other proceeding against that sovereign or state for the purpose of enabling complete justice to be done between them.' The other exception is 'the case in which a foreign sovereign may be named as defendant for the purpose of giving him notice of the claim which the plaintiff makes to funds in the hands of a third person or trustee over whom this court has jurisdiction.'" Lanrance, J., in *Mighell* v. *Sultan of Jahore*, 1 Q. B. 1894, 149. This latter case practically decides the interesting question of a sovereign sued incognito. If he declares himself in his sovereign capacity, the suit must drop. In the recent case of *So. African Rep.* v. *La Compagnie Franco-Belge &c.*, 1898, L. R., 1 Ch. 190, a foreign sovereign brought suit in England to restrain defendants from using a fund in their hands in certain ways. Defendants set up a claim for damages, upon which it was held, that while a sovereign suing in England submits to the jurisdiction for the purposes of allowing discovery in aid of the defendant in his action he does not submit to what is in its real nature a cross

VAVASSEUR v. KRUPP.

CHANCERY, 1878.

(*Law Reports*, 9 *Chancery Div.*, 351.)

Josiah Vavasseur, the plaintiff in this case, had brought an action against F. Krupp, of Essen, in Germany, Alfred Longsden, his agent in England, and Ahrens & Co., described as agents for the Government of Japan, claiming an injunction and damages for the infringement of the plaintiff's patent for making shells and other projectiles. The shells in question had been made at Essen, in Germany, had been there bought for the Government of Japan, had been brought to this country and landed here in order to be put on board three ships of war which were being built here for the Government of Japan, to be used as ammunition for the guns of those ships. On the 18th of January, 1878, an injunction was, without prejudice to any question, granted, restraining the defendants and the owners of the wharf where the shells lay from selling or delivering the shells to the Government of Japan, or to any person on their behalf, or otherwise from parting with, selling, or disposing of the shells and projectiles.

On the 11th of May an application to the court was made on behalf of the Mikado of Japan and his Envoy Extraordinary in this country, that, notwithstanding the injunction, the Mikado and his agents might be at liberty to remove the shells, and that if, and so far as might be necessary, the Mikado and his Envoy should for the purpose of making and being heard upon such application be added as defendants in the suit.

Upon this application an order was made by the Master of the Rolls that on the Mikado by his counsel submitting to the jurisdiction of this court and desiring to be made a defendant, and on payment into court by the Mikado of £100 as security for costs the name of the Mikado be added as a party defendant in the action.

Notice of motion was then given on the part of the Mikado that

action. Another claim arising from another and distinct matter may not be set up. On this case of first impression, see 11 Harv. Law Rev. 551.

The rule may be thus expressed, "once a sovereign, always a sovereign," at least for anything done while and in the capacity of a sovereign. See *Hatch* v. *Baez*, 1876, 7 Hun, 596, cited *ante* in *Underhill* v. *Hernandez*, 1895, 26 U. S. Appeals, 573, 578; *Duke of Brunswick* v. *King of Hanover*, 1848, 2 H. L. Cas. 1–16 cited 577–578 of same case. — ED.

the injunction might be dissolved, and that the Mikado might be at liberty to take possession, and remove, out of the jurisdiction of the court, the shells in question, the property of his Imperial Majesty.[1]

James, L. J., Brett, L. J., and Cotton, L. J., concurred, each delivering an opinion.

The following is that of Brett, L. J.:—"It does not seem to me that in this case there is any fact whatever in dispute.

"These shells were made by Krupp at Essen. That was no infringement of the plaintiff's patent. In Germany they were sold to the Mikado and paid for by the agents of the Mikado. None of these facts are in dispute; and this purchase and sale was a perfectly lawful purchase and sale. The Mikado had three ships of war building in this country, and he desired that these shells should be sent to this country and put on board these ships. They were sent to this country by the order and by the authority of the Mikado, through Ahrens & Co. They were brought into this country, and they were deposited on a wharf. The plaintiff then finding these shells in this country, and finding, as he alleges, that they were made according to the process of his patent, asserts that the bringing them into this country by Ahrens & Co. is an infringement of his patent by them; and thereupon he brings an action against Ahrens & Co., for the infringement. In that action he claims an injunction against Ahrens & Co., and it may be that he claims an order from the court to destroy those shells because he says they are an infringement of his patent. In the course of that suit an injunction is obtained against Ahrens & Co., and against others, which injunction in terms forbids them from delivering these shells, which with other things are in their possession, to the ships of the Mikado, and in fact forbids them from sending the shells to Japan. To this action the Mikado was no party, but he or his agents here come forward and claim to have the delivery and possession of these shells. The defendants in the action are not unwilling to give the shells to the Mikado, but they say, 'If we do so, it may be said that we have broken the injunction, and we may therefore be liable to certain penalties.' It seems to me beyond dispute that this was the purpose for which the Mikado came in and desired to be made a party to the suit, and the Master of the Rolls thus describes the purpose. [His Lordship then read the judgment of the Master of the Rolls.] Now it is said that in the first place there is a dispute whether these shells are the property of the Mikado. It is argued that if he were a private individual, then, although he has purchased these shells and paid for them, yet, inas-

[1] Short statement substituted for that of reporter. — Ed.

much as there has been an infringement of the patent, the property is not in him, because the court may order the shells to be destroyed. Is that argument good or not? To my mind it is utterly fallacious. The patent law has nothing to do with the property. The facts here are undisputed that Krupp made them with his own materials in Germany, where he had a right to make them; that he entered into a contract to sell specific shells to the Mikado; that that contract was performed, and that the shells were paid for, and that they were delivered in Germany to the Mikado's agent. Well, unless the patent law prevents the property from passing, nobody can doubt that the property passed to the Mikado. Therefore the dispute is not upon facts, but upon a false theory of law, that the patent law prevented the property from passing. I am clearly of opinion that the patent law did not prevent the property from passing. The goods were the property of the Mikado. They were his property as a sovereign; they were the property of his country; and therefore he is in the position of a foreign sovereign having property here.

"Whether the fact of Ahrens & Co. bringing these goods into England under these circumstances, and with this intention, was an infringement of the patent, I decline to consider. I shall assume for this purpose that it was an infringement, and that we have in this country property of the Mikado which infringes the patent. If it is an infringement of the patent by the Mikado you cannot sue him for that infringement. If it is an infringement by the agents, you may sue the agents for that infringement, but then it is the agents whom you sue. The injunction is against the agents, the Mikado being then no party to the action, and not being forbidden to do anything. He then comes here as a sovereign, and requires the delivery of his own goods. His only difficulty is the injunction against the agents, and for the purpose of enabling the court to make an order, he what is called 'submits himself to the jurisdiction of the court.' I think the interpretation put by the Master of the Rolls upon the order then made is right, and that it was only an order that the Mikado might be made a defendant for the purpose of enabling the court to make the order which the court has made. He now says 'I know not, and I care not, whether my agents have infringed your patent law. I have property in the country, which property is my own. I demand that it shall be delivered to me, and I make myself a defendant in your court merely for the purpose of your modifying the order which you have made, so that my agents may not be injured in consequence of their delivering to me my own property.'

"And the only order that the Master of the Rolls has made is that these goods may be delivered up to the Mikado; the meaning

of which is that the mere fact of the Mikado taking these shells away shall not be considered as against Ahrens & Co. an infringement of the injunction. That is the whole effect of this order. The Mikado has a perfect right to have these goods; no court in this country can properly prevent him from having goods which are the public property of his own country. Therefore it seems to me that this order which is really made for the benefit of Ahrens & Co., was an order rightly made, and that this appeal cannot be sustained."

In regard to the point of submission to the jurisdiction, COTTON, L. J., said:—"It is said that although under ordinary circumstances there is no jurisdiction as against a foreign sovereign, yet that in this particular case there is jurisdiction in consequence of the Mikado having come in and obtained the order of the 11th of May. It is said that a sovereign suing submits himself to the court as an ordinary plaintiff, and that the Mikado, in consequence of having obtained this order and acted upon it, puts himself in the position of an ordinary plaintiff. In the first place, there is this fallacy: the Mikado is not now in any way suing in the ordinary sense of the word, nor has he come to the court to establish as against an adverse claim his title to the property, which is really what is meant by a foreign sovereign coming here to sue to establish his rights. He is simply coming, and saying, 'The order of the court, possibly inadvertently, interferes with my sovereign rights. To prevent any question as to the defendants' committing a breach of the injunction by allowing me to remove the property, make an order that they be at liberty, notwithstanding the injunction, to hand them over to me!

"So that, in my opinion, the very foundation for the suggestion fails.

"But again, even if the Mikado had brought himself into court as an ordinary defendant, that, in my opinion, would not give the court jurisdiction as against the subject-matter, namely, jurisdiction to interfere with the public property of Japan, which is represented here by the Mikado. But when one comes to look at the form of the order, the Mikado does not by it come in as an ordinary defendant. By it he simply says 'I wish to bring before the court the facts: that these are my property, that the defendants were not constructing them under a contract for me, or using them under a contract with me, I wish to show that they are my property. I wish to apply for liberty to remove them as the public property of the state of Japan, and for that purpose, if necessary, I ask to come in.'

"In my opinion, the order taken fairly must be read with reference to the purpose for which the Mikado applied, and that being so, although possibly the form is not very happy, it is like a conditional

appearance entered where a defendant who considers himself improperly served with any proceeding, has entered a conditional appearance, in order to contest the questions, which he could not do without an appearance of some sort. It cannot, in my opinion, be said that the order puts the Mikado in the position of a plaintiff or of a person who is made *simpliciter* a defendant. He came in for the particular purpose of raising this question, and the form of the order, in my opinion, ought not in any way to prejudice the rights which he would have had independently of that order."

James, L. J.:—"This appeal is dismissed with costs." [1]

JOSEPH D. BEERS v. THE STATE OF ARKANSAS.

Supreme Court of the United States, 1857.

(20 *Howard*, 527.)

Mr. Chief Justice Taney delivered the opinion of the court.[2]

This was an action of covenant, brought in the Circuit Court for Pulaski County, in the State of Arkansas, to recover the interest due on sundry bonds issued by the State, and which the State had failed to pay according to its contract.

The constitution of the State provides, that "the General Assembly shall direct by law in what courts and in what manner suits may be commenced against the State." And in pursuance of this provision, a law was accordingly passed; and it is admitted that the present suit was brought in the proper court, and in the manner authorized by that law.

[1] In *Manning* v. *Nicaragua*, 1857, 14 How. Pr. 517, it was held that although sovereigns, or sovereign states cannot be sued in the courts of another state or nation for the purpose of *enforcing* any remedy against them, yet a state may be made defendant in an action for the purpose of giving it an opportunity to appear, thus enabling a court to decide more intelligently and equitably, in relation to demands which are sought to be enforced against other defendants; that states as well as individuals are the best judges of what affects their own dignity and advantage, and it may be safely left to their sovereign option to determine whether they will take part or not in a judicial controversy — Ed.

[2] Only the opinion of the court is given, and of this the last paragraph is omitted. — Ed.

The suit was instituted in the Circuit Court on the 21st of November, 1854. And after it was brought, and while it was pending in the Circuit Court, the Legislature passed an act, which was approved on the 7th of December, 1854, which provided, "that in every case in which suits or any proceedings had been instituted to enforce the collection of any bond or bonds issued by the State, or the interest thereon, before any judgment or decree should be rendered, the bonds should be produced and filed in the office of the clerk, and not withdrawn until final determination of the suit or proceedings, and full payment of the bonds and all interest thereon; and might then be withdrawn, cancelled, and filed with the State treasurer, by order of the court, but not otherwise." And the act further provided, that in every case in which any such suit or proceeding had been or might be instituted, the court should, at the first term after the commencement of the suit or proceeding, whether at law or in equity, or whether by original or cross bill, require the original bond or bonds to be produced and filed; and if that were not done, and the bonds filed and left to remain filed, the court should, on the same day, dismiss the suit, proceeding, or cross-bill.

Afterwards, on the 25th of June, 1855, the State appeared to the suit, by its attorney, and, without pleading to or answering the declaration of the plaintiff, moved the court to require him to file immediately in open court the bonds on which the suit was brought, according to the act of Assembly above mentioned; and if the same were not filed, that the suit be dismissed.

Upon this motion, after argument by counsel, the court passed an order directing the plaintiff to produce and file in court, forthwith, the bonds mentioned and described in the declaration. But he refused to file them, and thereupon the court adjudged that the suit be dismissed, with costs.

This judgment was afterwards affirmed in the Supreme Court of the State, and this writ of error is brought upon the last-mentioned judgment.

The error assigned here is, that the act of Dec. 7, 1854, impaired the obligations of the contracts between the State and the plaintiff in error, evidenced by and contained in each of the said bonds, and the indorsement thereon, and was therefore null and void, under the Constitution of the United States.

The objection taken to the validity of the act of Assembly cannot be maintained. It is an act to regulate the proceedings and limit the jurisdiction of its own courts in suits where the State is a party defendant, and nothing more.

It is an established principle of jurisprudence in all civilized

nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

Arkansas, by its Constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suit might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would have been made to it. The objection is that it was passed after this suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the Legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power, the State violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the State consented to be a party defendant.

Nor has the State court, in the judgment brought here for review, decided anything but a question of jurisdiction. It has given no decision in relation to the validity of the contract on which the suit is brought, nor the obligations it created, or the rights of parties under it. It has decided, merely, that it has no right under the laws of the State to try these questions, unless the bonds given by the State are filed. The plaintiff refused to file them pursuant to the order of the court, and the case was thereupon dismissed, for want of jurisdiction in the court to proceed further in the suit. There is evi-

dently nothing in the decision, nor in the act of Assembly under which it was made, which in any degree impairs the obligation of the contract, and nothing which will authorize this court to reverse the judgment of the State court.

The writ of error must therefore be dismissed, for want of jurisdiction in this court.[1]

Section 8. — Immunities of Diplomatic Agents.

HEATHFIELD *v.* CHILTON.

Court of King's Bench, 1767.

(4 *Burrow*, 2015.)

On showing cause why the defendant should not be discharged out of the custody of the marshal (upon 7 Ann. c. 12) as a domestic servant to Paul Pierre Russell, minister from the Prince Bishop of Liege — he swore himself to be *bona fide* English secretary to him; and to have been *bona fide* hired by him as such; and to have *bona fide* received wages as they became due, at the rate of £30 per annum.

[1] See the very valuable note to this case in Lawyer's edition of Sup. Ct. Reports, 2d ed., in which the learning on this subject is wellnigh exhausted. "This principle of immunity from suit," it is there said, "applies to every sovereign power, whether the form of government is monarchical or republican. It is essential to the common defence and general welfare. *Briggs* v. *The Light Boats*, 11 Allen, 162; The Siren, 7 Wall. 152; *U. S.* v. *Lee*, 106 U. S. 196. And but for the protection which it affords the Government would be unable to perform the various duties for which it was created. *Nicholas* v. *U. S.*, 7 Wall. 122, 126." See, also, an instructive note in 15 Harv. Law Rev. 59. In the United States this immunity from suit is, however, subject to the constitutional provision by which States in certain cases are made suable (Art. III. sect. 2). This is the familiar and elementary doctrine of the Supreme Court on this subject. A recent statement of it follows: "It is a fundamental principle of public law, affirmed by a long series of decisions of this court, . . . that no suit can be maintained against the United States or against their property, in any court, without express authority of Congress, 147 U. S. 512. See, also, *Belmap* v. *Schild*, 161 U. S. 10. The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case. Neither the Secretary of War nor the Attorney-General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers. *Case* v. *Terrell*, 11 Wall. 199, 202; *Carr* v. *U. S.*, 98 U. S. 433, 438; *U. S.* v. *Lee*, 106 U. S. 196, 205." (Mr. Justice Gray in *Stanley* v. *Schwalby*, 1895, 162 U. S. 270.) — Ed.

Both the minister himself and the relation of this man to him were objected to.

But Chilton's own affidavit was positive, as to the service, and that it was real and not colorable; and it was confirmed by a Mr. Chamberlayne, who called himself Secretary. He also swore that he was not an object of the bankrupt laws. He had been house-steward to Lord Northington. No certificate was produced, under the hand and seal of the minister; though the present application was made (as the attorney alleged) on the part of the minister; nor was it sufficiently sworn that the defendant was in the service of the minister, at the time when he was arrested.

Lord MANSFIELD. — The privileges of public ministers and their retinue depend upon the law of nations; which is part of the common law of England. And the act of Parliament of 7 Ann. c. 12 did not intend to alter, nor can alter the law of nations. His lordship recited the history of that act, and the occasion of it, and referred to the annals of that time. He said there is not one of the provisions in that act which is not warranted by the law of nations.

The law of nations will be carried as far in England as anywhere, because the Crown can do no particular favors, affecting the rights of suitors, in compliment to public ministers, or to satisfy their points of honor.

The law of nations, though it be liberal, yet does not give protections to screen persons who are not *bona fide* servants to public ministers, but only make use of that pretence in order to prevent their being liable to pay their just debts.

The law of nations does not take in consuls, or agents of commerce; though received as such by the courts to which they are employed. This was determined in Barbuit's Case in Canc. which was solemnly argued before and determined by Lord Talbot on considering and well-weighing Barbeyrac, Binkershoek, Grotius, Wincquefort, and all the foreign authorities (for there is little said by our own writers on this subject). In that case several curious questions were debated.

If I did not think there was enough in the present case, already appearing to the court, to enable us to form an opinion, I should desire to know in what manner this minister was accredited. Certainly he is not an ambassador, which is the first rank. Envoy, indeed, is a second class; but he is not shown to be even an envoy. He is called "minister," 't is true, but minister (alone) is an equivocal term.

I find this is not an application by the attorney-general by the direction and at the expense of the Crown. That, indeed, would have

shown that the Crown thought this person entitled to the character of a public minister. It now remains uncertain what his proper character is.

But supposing him to be a minister of such a kind as entitles him to privilege; yet I think this is not a case of privilege by the law of nations, for the defendant does not appear to have been in the service of the minister at the time of the arrest.

A public minister shall not take a man from the custody of the law; though the process of the law shall not take his menial servant out of his service.

Here it is not sworn when the defendant came into the service. And upon the manner of swearing here used, the court must take it "that he was not in the minister's service at the time of the arrest."

Mr. Justice YATES was not in court.

Mr. Justice ASHTON concurred. The rule laid down by Lord MANSFIELD is a very right one. The process of the law shall not, indeed, take a person out of the service of a public minister; but, on the other hand, a public minister cannot take a person out of the custody of the law. If a man has no such privilege at the time of his being arrested, no subsequent privilege can be given him, by being afterwards taken into the service of a public minister.

Therefore, as it does not appear here that the defendant was then in the service, he cannot be entitled to this privilege.

This is a true and right principle, and the establishing it may prevent many of these applications.

Mr. Justice HEWITT concurred, and repeated and confirmed the principle; and agreed that it does not here appear that the defendant was. at the time of the arrest, in the service of this minister.

Lord MANSFIELD took occasion to observe that the registering the name of the defendant in the Secretary of State's office, and transmitting it to the sheriff's office (mentioned in the fifth section), relates only to the bailiff who arrested him and is no condition precedent to the being entitled to the privilege of a public minister's servant. In this, Mr. Justice ASHTON also concurred.

Per cur. unanimously.

Rule discharged.[1]

[1] See the early case of *Cross* v. *Talbot*, 10 Geo. 1, 8 Mod. 288; and see § 1, *ante*, for *Triquet* v. *Bath*, 1764, 3 Burr. 1478. The following are famous cases from the text-books, cited incidentally, but not decided in the law reports: A. Cases of criminal jurisdiction: Case of Leslie, Bishop of Ross, 1571, to the effect that the ambassador of a deposed sovereign is entitled to diplomatic immunity, 2 Ward's Law of Nations, 486; Mendoza's Case, 1584, holding that an ambassador should not be punished, but may be sent out of the country, ib., 522; Case of Da Sa, 1653, in which the

PARKINSON v. POTTER.

QUEEN'S BENCH, 1885.

(*Law Reports*, 16 *Queen's Bench Div.*, 152.)

WILLS, J.[1] The plaintiff in this case sues the defendant for parochial rates which he has paid, and which he contends he is entitled to be repaid by virtue of the defendant's covenant with him. The plaintiff is the owner and the defendant the lessee of a house, in respect of the occupation of which the rates were assessed. The defendant has assigned or sublet to Senhor Pinto de Basto, who is said to be an attaché of the Portuguese embassy and who has on that ground refused to pay them. Under a local act the landlord is liable in such a case; and the first question that arises is whether the person in question was entitled to the immunity which he has claimed.

The evidence that Senhor Pinto de Basto is an attaché to the Portuguese legation is slight, but I think there is evidence of the fact. It seems that he is known at the embassy as an attaché, and is there spoken to and spoken of as an attaché, and treated as an attaché. It seems that there is no salary attached to the post, but that the government of his country can exact from him certain small services; and that he has in fact been employed by the minister occasionally to write letters and to take messages, and to help in the translation of documents connected with the diplomatic work of the embassy, and that he goes often to the embassy and places himself at the disposal of the ambassador.

brother of an ambassador and a member of his suite was executed for sedition and murder, ib. 537; Gyllenborg's Case, 1717, deciding that an ambassador who conspires to overthrow the government to which he is accredited may be arrested and his papers seized, ib. 548; Prince Cellamare's Case, 1718, where an ambassador was arrested and conducted across the frontiers into his own country for conspiring against the accrediting state, 1 Martens' Causes Célèbres, 149. B. Civil jurisdiction: Case of Peter the Great's Ambassador, 1708, § 1, *ante*, and 1 Black. Com. Ch. VIII; Case of Baron de Wrech, 1772, in which the French Government withheld a minister's passports until his debts were paid, 2 Martens' Causes Célèbres, 282; Wheaton's Case, 1839, Dana's Wheaton, 307–318; 5 Martens' C. C. 295; *Byrne* v. *Herran*, 1863, 1 Daly (N. Y.), 344, 346; Dillon's Case, 1854, holding that a treaty stipulation exempting consul from appearing as witness in court, yields to constitutional privilege of compulsory process to compel presence of witnesses, 1 Wharton's Digest, 665; (*In Re Dillon*, 1854, 7 Sawyer, 561, same case, 7 Fed. Cases, 10); Case of Dubois, 1856, recognizing that a foreign minister cannot be compelled to appear in court as a witness, Sen. Ex. Doc. No. 21, 34th Cong., 3d Sess. — ED.

[1] The statement of the case and the opinion of Mathews, J., are omitted. In addition to cases cited by Wills, J., see *Hopkins* v. *De Robeck*, 1789, 3 T. R. 79. — ED.

I think this is evidence upon which the county court judge might fairly find that he was an attaché. If it be once ascertained that he was a person treated at the embassy as a member of the legation, possessing in diplomatic matters more or less of the confidence of the minister and employed from time to time by him in the work of the legation, I think it is not for us to measure the *quantum* of the services either required from or rendered by him. If there were any reason to suppose that the so-called appointment was a sham, as in a case reported in the books, in which a Christian clergyman was supposed to be domestic chaplain to the ambassador of the Emperor of Morocco; if he were one of an inordinate number of idlers nominally attached to the embassy and not wanted there, or there were any other circumstances from which it might be gathered that the appointment was not *bona fide*, the case would be otherwise. But I can very well understand that, seeing the close connection between diplomatic business and some of the matters which it falls to a consul-general to transact, there may be a convenience in clothing the consul-general with the additional character of an attaché, which may explain and justify his appointment in that capacity, although his services in a diplomatic character may be only slight and occasional.

An attaché is a well-known term in the diplomatic service. He forms part of the regular suite of an ambassador. He is classed by Calvo, the author of an elaborate French work on international law, published in 1880, and written with admirable clearness and with a copiousness of historical illustration which makes his treatise most interesting as well as instructive, along with "Conseillers et Sécrétaires," and he gives a common description of the functions of all three classes of officers as consisting in supporting the minister in all things, in preparing and forwarding official despatches, in carrying out communications by word of mouth with the public administrative authorities of the country to which the minister is accredited, in classifying and keeping charge of the archives of the mission, in ciphering and deciphering despatches, in making minutes of the letters which the minister may have to write, and similar services; and he treats the attaché as undoubtedly entitled to all the immunities accorded to the suite of an ambassador: Calvo, International Law, Vol. I., p. 486.

One of these immunities, insisted upon by all writers on international law with whose works I have any acquaintance, as beyond question, is the complete exemption from the jurisdiction of the courts of the country to which the minister is accredited. They are all, so far as I have been able to ascertain, equally clear in the opinion that the exemption extends to the family and suite of

the ambassador. "This immunity," says Wheaton, "extends not only to the person of the minister but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides": International Law, Ed. 1863, p. 394. Again, "the wife and family, servants, and suite of the minister participate in the inviolability attached to his public character": Ibid. 397. For these propositions he quotes Grotius, Bynkershoek, Vattel, and Martens, and he treats these privileges as essential to the dignity of his sovereign and to the duties he is bound to perform. Martens says, "The exemption from civil jurisdiction, contentious and voluntary alike, is general, and belongs to ministers throughout the whole extent of the country in which they reside. They enjoy it for themselves, for their suite, and for their effects, in as far, be it always understood, as they do not travel out of their diplomatic character": Guide Diplomatique, Vol. I., p. 81. To the same effect is the statement by Calvo: "The staff of the mission, the wife and family of the diplomatic agent, participate in these prerogatives," and amongst the prerogatives there enumerated is that "he is exempt from the local jurisdiction of the country into which he is sent; no legal process can be brought against him before the tribunals of the place of his residence": Vol. I., p. 381. "The person who enjoys exterritoriality," says the German Bluntschli, "cannot be subjected to any impost": International Law Codified, art. 138. "The family, the staff, the suite, and the servants of him who has the right of exterritoriality," says the same writer, "enjoy the same immunity as himself. His suite have the right but indirectly and on account of him to whom they are attached": Art. 145. "Such persons are exempt from jurisdiction": Art. 147. "The immunity of the person exempted extends to the members of his suite": Heffter, International Law of Europe, sec. 42, VI. These are amongst the most recent French and German authorities upon the subject, and are for the most part subsequent to those cited in the elaborate arguments in *Taylor* v. *Best*, 14 C. B. 487, and *Magdalena Steam Navigation Co.* v. *Martin*, 2 E. & E. 94; and, so far as I have been able to ascertain, no writer on international law appears to entertain any doubt upon this point.

It was urged for the defendant that there are English authorities conflicting with these propositions. I do not think it is so, if they are carefully considered. It was said that in *Fisher* v. *Begrez*, 1 C. & M. 117, it was held that the goods of a chorister to the Bavarian embassy were not privileged from execution under a *fi. fa.*; but in that case the sheriff had not executed the *fi. fa.*; nor was the protection of the court claimed by the ambassador or his servant. The

sheriff claimed to be exempt from the duty of levying. The defendant had allowed himself to be sued and the action to proceed to judgment and execution without claiming the privilege, and the sheriff applied to the court upon affidavits which were quite insufficient to show, and failed to satisfy the court, that there was any foundation for the allegation that the defendant was then in the service of the Bavarian minister.

In *Novello* v. *Toogood*, 1 B. & C. 554, it was held that the goods of a chorister in the service of the Portuguese ambassador were not privileged from distress for poor-rates. But in that case the servant was carrying on the business of a lodging-house keeper in the house in question. Most writers on international law say that with regard to an ambassador even, although he does not lose his privileges as an ambassador by engaging in trade in the country to which he is accredited, yet the immunity of his goods does not extend to protect his stock in trade. The *ratio decidendi* in *Novello* v. *Toogood*, *supra*, is that the plaintiff Novello, who claimed exemption from poor-rate, was carrying on the business of a lodging-house keeper in the house in question.

An exception from the privilege of being exempt from jurisdiction is, by the statute of 7 Ann., c. 12, sec. 5, specifically applied to the case of an ambassador's servant carrying on a trade; and in *Novello* v. *Toogood*, *supra*, Abbott, C. J., so far from hinting a doubt as to the general principle that the immunity from process extends to the servant of the ambassador, observes, "I do not say that he may not have a house fit and convenient for his situation as the servant of an ambassador, nor that the furniture in such a house will not be privileged." It may be added that Novello was a British-born subject, and that most writers on international law are of opinion that a subject of the country in which the ambassador is resident remains subject to the law of his country, and that in respect of him the immunity which would be afforded to a foreigner cannot be claimed. *Poitier* v. *Croza*, 1 Wm. Bl. 48, was cited, but in that case the court was convinced that the alleged service was a sham.

Reliance was placed on *Taylor* v. *Best*, 14 C. B. 487, 490. But the substance of the decision in that case was that, where the ambassador had voluntarily appeared as one of several defendants, and defended the action up to judgment, he had waived his privilege, and it was too late for him to apply to have all further proceedings stayed or to have his own name struck out of the record. It is true that Maule, J., expressed doubts as to whether an ambassador in England could claim a complete immunity from all English process. But that doubt was removed and pronounced to be ill-founded in the considered and

elaborate judgment of the court of Queen's Bench in *Magdalena Steam Navigation Co.* v. *Martin*, 2 E. & E. 94, in which it was held that the minister of a foreign country cannot be sued against his will in this country, although the action may arise out of commercial transactions carried on by him here. There is, therefore, nothing in the current of English authorities to contravene the doctrine of exemption from process — a part of the privileges which constitute the "exterritoriality" of foreign jurists — as laid down by the writers on international law: and there is nothing in the circumstances of this case to prevent its application to Senhor de Basto. He is not carrying on trade nor letting lodgings; and the house in question is simply the private residence of himself and his family; and I am of opinion that he was not liable to pay the rates assessed upon him in respect of his occupation.

It follows that under s. 190 of the local act the plaintiff, as the landlord of his house, was liable to pay them; and, having paid them, it is clear that, under the covenant sued upon, the defendant is bound to recoup him. The judgment of the county court judge was right, therefore, and the appeal must be dismissed with costs.

Appeal dismissed.[1]

[1] In *Macartney* v. *Garbutt*, 1890, 24 Q. B. D. 368, it was held that this immunity extended to a diplomatic agent, although a subject of the receiving county, unless the immunity were specifically limited before receiving such agent.

Where, however, a British subject in debt was appointed honorary attaché of the Persian embassy for the purpose of escaping bankruptcy, diplomatic immunity from suit was disallowed. (*In Re Cloete*, 1891, 65 L. T. 102, 7 Times R., 565.)

In other words, for the immunity to attach, the claimant must be actually and *bona fide* in the diplomatic service, either as agent or servant; if the claim be colorable merely it will be rejected. On this point the authorities are numerous and unanimous: *Lockwood* v. *Dr. Coysgarne*, 1765, 3 Burr. 1676; *Fisher* v. *Begrez*, 1832, 1 C. & M. 117; same case, 2 C. & M. 240, and cases cited in argument of case as reported in 1 C. & M. While the diplomatic agent may waive immunity of his servant, he cannot in the United States waive his own immunity, as this is the privilege of his State, not a personal privilege. (*U. S.* v. *Benner*, 1830, Bald. 234.)

In *Guiteau's Trial* (1881), 1 Wharton's Digest, 669, Señor Camacho, minister from Venezuela, who was present at President Garfield's assassination, was called as a witness for the prosecution.

Before he was sworn the following statement was made by the district attorney:

"If your honor please, before the gentleman is sworn, I desire to state, or rather I think it due to the witness to state, that he is the minister from Venezuela to this Government, and entitled under the law governing diplomatic relations to be relieved from service by subpœna or sworn as a witness in any case.

"Under the instructions of his government, owing to the friendship of that government for the United States, and the great respect for the memory of the man who was assassinated, they have instructed him to waive his rights and appear as a witness in the case, the same as any witness who is a citizen of this country."

Respublica v. *De Longchamps*, 1 Dallas, 110 (1784): — The defendant threatened to

IN RE BAIZ.

SUPREME COURT OF THE UNITED STATES, 1889.

(135 *United States*, 403.)

Mr. Chief Justice FULLER delivered the opinion of the court.[1]

The judicial power of the United States extends to "all cases affecting ambassadors, other public ministers, and consuls." Const. Art. III, sec. 2.

By section 687 of the Revised Statutes, it is provided that the Supreme Court "shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have consistently

assault the Secretary of the French Legation, the threats being made in the house of the French minister. The defendant was fined $500 and imprisoned two years.

United States v. *Liddle*, 2 Wash. Circ. Ct. 205 (1808): — Indictment for assault and battery on a member of the Spanish Legation. The law is the same whether the attacked is a private party or an ambassador, viz., if the ambassador was the prior assaulting party, the defendant is excused for his subsequent assault.

The law of nations identifies the property of the foreign minister, attached to his person or in his use, with his person. To insult them is an attack on the minister, and his sovereign; but to constitute an offence against a foreign minister, the defendant must have known that the house attacked was the domicile of a minister, for otherwise it is only an offence against the municipal laws of the state, *U. S.* v. *Hand*, 1810, 2 Wash. C. C. 435.

United States v. *Ortega*, 4 Wash. Circ. Ct. 531 (1825): — Indictment for an assault on the Spanish Chargé d'Affaires. Cites Liddle's case and affirms it: "A foreign minister, by committing the first assault, so far loses his privilege, that he cannot complain of an infraction of the law of nations; if, in his turn, he should be assaulted by the party aggrieved."

Nitchencoff's Case, 1865, 10 Solic. Law Journal, 56: "The French Court of Cassation has quashed the appeal of Nitchencoff, the Russian sentenced to imprisonment for life for a murderous attack upon M. de Balsh, in the house of the Russian Ambassador in Paris. It will be remembered that this case gave rise to a diplomatic correspondence, the Russian Government having disputed the right of the French courts to try the murderer, and claimed a right to have him given up for trial in Russia. The court laid down the law that "the fiction of the law of nations, according to which the house of an ambassador is reputed to be a continuation of the territory of his sovereign, only protects diplomatic agents and their servants, and does not exclude the jurisdiction of French courts, in case of a crime committed in such a locality by a person not belonging to the embassy, even although he is a subject of the nation from which the ambassador is accredited."

On the subject generally see the excellent note to Dana's Wheaton, 303–307; 5 Op. Att. Gen. 76; U. S. Rev. St. 1875, §§ 4062–4065. — ED.

[1] Only so much of the opinion is given as relates to the claim of diplomatic immunity. — ED.

with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or a vice-consul is a party." By section 563 it is provided that "the District Courts shall have jurisdiction as follows: * * * Seventeenth. Of all suits against consuls or vice-consuls," except for certain offences. The petitioner has been, since July, 1887, the consul general of the Republic of Guatemala, and therefore the District Court had jurisdiction of the action in question, unless he belonged to the class of official personages subject to suits or proceedings only in this court. This he insists was the fact, and avers in his petition, as he did in his plea in the District Court, that at the time of the commencement of the action and until and including the 10th day of July, 1889, which was the eighth day after service of process upon him, he was "the acting minister and sole representative of said republic [of Guatemala] in the United States," and for that reason came within the words of section 687, "other public ministers."

The exemption asserted ceased on the 10th of July, 1889, and on the 17th of July the petitioner gave a general notice of appearance in the action, but did not set up the want of jurisdiction until the 25th of the following September. Suit could have been brought in that court against him on the 11th day of July, but as in his view this could not have been done on the 29th of June or the 2d of July, he contends that the District Court should be ordered to dismiss the suit, though it could at once be recommenced therein. But it is said that the appearance did not waive the right to be sued in this court rather than in the District Court, because that was the privilege of the country or government which he represented. Without pausing to inquire how far this is a correct application of the international privilege of not being sued at all, its assertion, even in this restricted form, serves to emphasize petitioner's contention that he was at that time the minister or diplomatic agent of the republics of Guatemala, Salvador and Honduras in the United States, intrusted by virtue of his office with authority to represent those republics in their negotiations and to vindicate their prerogatives. Under section 2, Art. II., of the Constitution, the President is vested with power to "appoint ambassadors, other public ministers and consuls," and by section 3 it is provided that "he shall receive ambassadors and other public ministers."

These words are descriptive of a class existing by the law of nations, and apply to diplomatic agents whether accredited by the United States to a foreign power or by a foreign power to the United States, and the words are so used in section 2 of Art. III. These agents may be called ambassadors, envoys, ministers, commissioners, chargés d'affaires, agents, or otherwise, but they possess in substance the

same functions, rights and privileges as agents of their respective governments for the transaction of its diplomatic business abroad. Their designations are chiefly significant in the relation of rank, precedence or dignity. 7 Opinions Atty. Gen. (Cushing), 186.

Hence, when in subdivision fifth of section 1674 of the Revised Statutes we find "diplomatic officer" defined as including "ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, chargés d'affaires, agents and secretaries of legation, and none others," we understand that to express the view of Congress as to what are included within the term "public ministers," although the section relates to diplomatic officers of the United States.

But the scope of the words "public ministers" is defined in the legislation embodied in Title XLVII., "Foreign Relations," Rev. Stat., 2d Ed. 783. Section 4062 provides that "every person who violates any safe conduct or passport duly obtained and issued under authority of the United States; or who assaults, strikes, wounds, imprisons or in any other manner offers violence to the person of a public minister, in violation of the law of nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court." Section 4063 enacts that whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized or attached, such writ or process shall be deemed void. Section 4064 imposes penalties for suing out any writ or process in violation of the preceding section; and section 4065 says that the two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States "in the service of a public minister," and process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a "domestic servant of a public minister," unless the name of the servant has been registered and posted as therein prescribed.

Section 4130, which is the last section of the title, is as follows: "The word 'minister,' when used in this title, shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word 'consul' shall be understood to mean any person invested by the United States with, and exercising, the functions of consul general, vice-consul general, consul or vice-consul."

Sections 4062, 4063, 4064 and 4065 were originally sections 25, 26,

27 and 28 of the Crimes Act of April 30, 1790, Ch. 9, 1 Stat. 118; and these were drawn from the statute 7 Anne, c. 12, which was declaratory simply of the law of nations, which Lord Mansfield observed, in *Heathfield* v. *Chiton*, 4 Burr, 2015, 2016, the act did not intend to alter and could not alter.

In that case, involving the discharge of the defendant from custody, as a domestic servant to the minister of the Prince Bishop of Liège, Lord Mansfield said: "I should desire to know in what manner this minister was accredited — certainly, he is not an ambassador, which is the first rank — envoy, indeed, is a second class; but he is not shown to be even an envoy. He is called 'minister,' 't is true; but minister (alone) is an equivocal term." The statute of Anne was passed in consequence of the arrest of an ambassador of Peter the Great for debt, and the demand by the Czar that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death, 1 Bl. Com. 254; and it was in reference to this that Lord Ellenborough, in *Viveash* v. *Becker*, 3 M. & S. 284, where it was held that a resident merchant of London, who is appointed and acts as consul to a foreign prince, is not exempt from arrest on mesne process, remarked: "I cannot help thinking that the act of Parliament, which mentions only 'ambassadors and public ministers,' and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried."

Three cases are cited by counsel for petitioner arising under or involving the act of 1790. In *United States* v. *Liddle*, 2 Wash. C. C. 205, in the case of an indictment for an assault and battery on a member of a foreign legation, it was held that the certificate of the Secretary of State, dated subsequently to the assault and battery, is the best evidence to prove the diplomatic character of a person accredited as a minister by the government of the United States. The certificate from the Secretary of State, Mr. Madison, stated that "when Mr. Feronda produced to the President his credentials as chargé des affaires of Spain, he also introduced De Lima, as a gentleman attached to the legation and performing the duties of secretary of legation," and the certificate was held to be the best evidence to prove that Feronda was received and accredited, and that at the same time De Lima was presented and received as secretary attached to the legation. In *United States* v. *Ortega*, 4 Wash. C. C. 531, there was produced in court an official letter from the Spanish minister to the Secretary of State, informing him that he had appointed Mr. Salmon charge d'affaires; a letter from the minister to Mr. Salmon; a letter from the Secretary

of State addressed to the Spanish minister, recognizing the character of Mr. Salmon; two letters from the Secretary of State addressed to Mr. Salmon as chargé d'affaires; and the deposition of the chief clerk of the State Department that Mr. Salmon was recognized by the President as chargé d'affaires, and was accredited by the Secretary of State. In *United States* v. *Benner*, Baldwin, 234, the court was furnished with a certificate from the Secretary of State that the Danish minister had by letter informed the department that Mr. Brandis had arrived in this country in the character of attaché to the legation, and that said Brandis had accordingly, since that date, been recognized by the department as attached to the legation in that character.

These cases clearly indicate the nature of the evidence proper to establish whether a person is a public minister within the meaning of the Constitution and the laws, and that the inquiry before us may be answered by such evidence, if adduced.

Was Consul General Baiz a person "invested with and exercising the principal diplomatic functions," within section 4130, or a "diplomatic officer," within section 1674? His counsel claim in their motion that he was "the acting minister or chargé d'affaires of the Republics of Guatemala, Salvador and Honduras in the United States," and so recognized by the State Department, and that he exercised diplomatic functions as such, and therefore was a public minister, within the statute.

By the Congresses of Vienna and Aix-la-Chapelle four distinct kinds of representation were recognized, of which the fourth comprised chargés d'affaires, who are appointed by the minister of foreign affairs, and not as the others, nominally or actually by the sovereign. Under the regulations of this Government the representatives of the United States have heretofore been ranked in three grades, the third being chargés d'affaires. Secretaries of legation act *ex officio* as chargés d'affaires *ad interim*, and in the absence of the secretary of legation the Secretary of State may designate any competent person to act *ad interim*, in which case he is specifically accredited by letter to the minister for foreign affairs.

Wheaton says: "Chargés d'affaires, accredited to the ministers of foreign affairs of the court at which they reside, are either chargés d'affaires *ad hoc*, who are originally sent and accredited by their governments, or chargés d'affaires *ad interim*, substituted in the place of the minister of their respective nations during his absence." Elements Int. Law (8th Ed.), § 215.

Ch. de Martens explains that "chargés d'affaires *ad hoc* on permanent mission are accredited by letters transmitted to the minister of foreign affairs. Chargés d'affaires *ad interim* are presented as such

by the minister of the first or second class when he is about to leave his position temporarily or permanently." Guide Diplomatique, Vol. I, p. 61, § 16.

"They," observes Twiss in his Law of Nations, 192, "are orally invested with the charge of the embassy or legation by the ambassador or minister himself, to be exercised during his absence from the seat of his mission. They are accordingly announced in this character by him before his departure to the minister of foreign affairs of the court to which he is accredited."

Diplomatic duties are sometimes imposed upon consuls, but only in virtue of the right of a government to designate those who shall represent it in the conduct of international affairs, 1 Calvo, Droit Int. 586, 2d Ed., Paris, 1870, and among the numerous authorities on international laws, cited and quoted from by petitioner's counsel, the attitude of consuls, on whom this function is occasionally conferred, is perhaps as well put by De Clercq and De Vallat as by any, as follows:

"There remains a last consideration to notice, that of a consul who is charged for the time being with the management of the affairs of the diplomatic post; he is accredited in this case in his diplomatic capacity, either by a letter of the minister of foreign affairs of France to the minister of foreign affairs of the country where he is about to reside, or by a letter of the diplomatic agent whose place he is about to fill, or finally by a personal presentation of this agent to the minister of foreign affairs of the country." Guide Pratique des Consulats, Vol. I., p. 93.

That it may sometimes happen that consuls are so charged is recognized by section 1738 of the Revised Statutes, which provides:

"No consular officer shall exercise diplomatic functions, or hold any diplomatic correspondence or relation on the part of the United States, in, with, or to the government, or country to which he is appointed, or any other country or government when there is in such country any officer of the United States authorized to perform diplomatic functions therein; nor in any case, unless expressly authorized by the President so to do."

But in such case their consular character is necessarily subordinated to their superior diplomatic character. "A consul," observed Mr. Justice Story, in *The Anne*, 3 Wheat. 435, 445, "though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerog-

atives. There is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it."

When a consul is appointed chargé d'affaires, he has a double political capacity; but though invested with full diplomatic privileges, he becomes so invested as chargé d'affaires and not as consul, and though authorized as consul to communicate directly with the government in which he resides, he does not thereby obtain the diplomatic privileges of a minister. Atty. Gen. Cushing, 7 Opinions, 342, 345.

This is illustrated by the ruling of Mr. Secretary Blaine, April 12, 1881, that the Consul General of a foreign government was not to be regarded as entitled to the immunities accompanying the possession of diplomatic character, because he was also accredited as the "political agent" so-called of that government, since he was not recognized as performing any acts as such, which he was not equally competent to perform as Consul General. 1 Whart. Dig. Int. Law, 2d Ed., ch. 4, § 88, p. 624.

We are of opinion that Mr. Baiz was not, at the time of the commencement of the suit in question, chargé d'affaires *ad interim* of Guatemala, or invested with and exercising the principal diplomatic functions, or in any view a "diplomatic officer." He was not a public minister within the intent and meaning of § 687; and the District Court had jurisdiction.

Mr. Baiz was a citizen of the United States and a resident of the city of New York. In many countries it is a state maxim that one of its own subjects or citizens is not to be received as a foreign diplomatic agent, and a refusal to receive, based on that objection, is always regarded as reasonable. The expediency of avoiding a possible conflict between his privileges as such and his obligations as a subject or citizen, is considered reason enough in itself. Wheaton, 8th Ed., § 210; 2 Twiss, Law of Nations, 276, § 186; 2 Phill. Int. Law, 171. Even an appointment as consul of a native of the place where consular service is required, is, according to Phillimore, "perhaps, rightfully pronounced, by a considerable authority, to be objectionable in principle." Vol. II., p. 291, citing De Martens & De Cussey, Recueil des Traités, Index Explicatif, p. xxx., Tit. "Consuls."

"Other powers," says Calvo, Vol. I., p. 559, 2d Ed., "admit without difficulty their own citizens as representatives of foreign states, but imposing on them the obligation of amenability to the local laws as to their persons and property. These conditions, which, nevertheless, ought never to go so far as to modify or alter the representative character, ought always to be defined before or at the time of receiving the

agent; for otherwise, the latter might find it impossible to claim the honors, rights and prerogatives attached to his employment." See also Heffter, 3d Fr. Ed., 387.

In the United States, the rule is expressed by Mr. Secretary Evarts, under date of Sept. 19, 1879, thus: "This Government objects to receiving a citizen of the United States as a diplomatic representative of a foreign power. Such citizens, however, are frequently recognized as consular officers of other nations, and this policy is not known to have hitherto occasioned any inconvenience." And again, April 20, 1880, while waiving the obstacle in the particular instance, he says: "The usage of diplomatic intercourse between nations is averse to the acceptance, in the representative capacity, of a person who, while native born in the country which sends him, has yet acquired lawful status as a citizen by naturalization of the country to which he is sent." 1 Wharton Dig. Int. Law, 2d Ed., § 88*a*, p. 628. Of course the objection would not exist to the same extent in the case of designation for special purposes or temporarily, but it is one purely for the receiving government to insist upon or waive at its pleasure. The presumption, therefore, would ordinarily be against Mr. Baiz's contention, and, as matter of fact, we find that when, in 1886, he was appointed chargé d'affaires of the Republic of Honduras to the Government of the United States, Mr. Secretary Bayard declined receiving him as the diplomatic representative of the government of that country, because of his being a citizen of the United States, and advised him that: "It has long been the almost uniform practice of this Government to decline to recognize American citizens as the accredited diplomatic representatives of foreign powers. The statutory and jurisdictional immunities and the customary privileges of right attaching to the office of a foreign minister make it not only inconsistent, but at times even inconvenient, that a citizen of this country should enjoy so anomalous a position." And in a subsequent communication rendered necessary by a direct question of Mr. Baiz, the Secretary informs him "that it is not the purpose of the department to regard the substitutionary agency, which it cheerfully admits in your case, as conferring upon you personally any diplomatic status whatever." This correspondence disposes of the question before us. The objection which existed in 1886 to the reception of Mr. Baiz as chargé d'affaires *ad hoc* or *ad interim*, or according to him any diplomatic status whatever, whether temporary or otherwise, existed in 1889; and it is out of the question to assume that the State Department intended to concede the diplomatic status between January 16 and July 10, 1889, upon the request of Señor Lainfiesta that Consul General Baiz might be allowed to be a medium of communication during his absence, which

it had refused to accord to the Republic of Honduras itself. It is evident that the statement of the Assistant Secretary, October 4, 1889, was quite correct, that "the business of the legation [of Guatemala] was conducted by Consul General Baiz, but without diplomatic character."

Regarding the matter in hand as, in its general nature, one of delicacy and importance, we have not thought it desirable to discuss the suggestions of counsel in relation to the remedy, but have preferred to examine into and pass upon the merits.

We ought to add that while we have not cared to dispose of this case upon the mere absence of technical evidence, we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof.

Our conclusion is, as already stated, that the District Court had jurisdiction, and we accordingly discharge the rule and

Deny the writs.[1]

[1] Until recently the United States had no diplomatic representatives of the rank of ambassadors. The right to appoint such was conferred by act of Mch. 1, 1893 (27 St. L. 497). "Whenever the President shall be advised that any foreign government is, or is about to be, represented in the United States by an ambassador . . . he is authorized, in his discretion, to direct that the representative of United States to such government shall bear the same designation. This provision shall in nowise affect the duties, powers, or salary of such representative." See elaborate opinions by C. Cushing in 7 Op. Atty. Gen. 186-229; 582-594.

A consul is a commercial, not a diplomatic agent, and has no claim under international law to immunity from the civil or criminal jurisdiction of the country in which he is stationed, *Barbuit's Case*, 1737, Cas. Temp. Talbot, 231; *Clarke* v. *Cretico*, 1808, 1 Taunt. 106; *Viveash* v. *Becker*, 1814, 3 M. & S. 284; *Commonwealth* v. *Kosloff*, 1816, 5 Serg. & Rawle (Pa.), 545. "Consuls," said Mr. Justice Swayne, in *Coppell* v. *Hall*, 1868, 7 Wall. 542, 553, "are approved and admitted by the local sovereign. If guilty of illegal or improper conduct, the exequatur which has been given may be revoked, and they may be punished, or sent out of the country, at the option of the offended government. In civil and criminal cases, they are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the state (Dana's Wheaton, § 249; 1 Kent's Commentaries, 53). A trading consul, in all that concerns his trade, is liable in the same way as a native merchant (2 Phillimore's International Law, ccli.) The character of consul does not give any protection to that of merchant when they are united in the same person. (*The Indian Chief*, 3 C. Robinson, 27; *Arnold* v. *The U. S. Insurance Co.*, 1 Johnson's Cases, 363)." See also opinion of C. Cushing, 8 Op. Atty. Gen. 169.

American consuls are forbidden in a large number of places to trade (11 U. S., St. L. c. 127, p. 55, § 5). And such seems also to be the modern English policy (Abdy's Kent, 131, note 1).

While consuls are and always have been liable to suit in the United States, they,

GEORGE WILSON v. GUZMAN BLANCO.

SUPERIOR COURT OF THE CITY OF NEW YORK, 1889.

(56 *New York Superior Court*, 582.)

Appeal from an order of the special term vacating the judgment in this action and setting aside the service of the summons therein upon Guzman Blanco.

The following opinion was delivered by the court at special term:

O'GORMAN, J. Guzman Blanco, being an envoy extraordinary and minister plenipotentiary, duly accredited from Venezuela to France, and recognized as such by the Government of the United States, and while in the City of New York, waiting to take early means of conveyance from this city to France, was served with a summons in this action. Failing to make any appearance in the action, judgment was recovered against him for the sum of $2,194,536.

A motion is now made to set aside the judgment, and vacate the service of summons upon him, on the ground that he was, when so served, an ambassador, and as such, not amenable to any civil suit brought against him in this city or State.

It is conceded for the purposes of this motion that he could not lawfully have been *arrested*, while thus in the City of New York, and this concession is in accordance with the judgment of this court in *Holbrook* v. *Henderson*, 4 Sand. Super. Ct. 626. The court there, however, went farther, and expressed the opinion that the privilege of an ambassador extended to immunity against *all civil suits* sought to be instituted against him in the courts of the country to which he was accredited, as well as in those of a friendly country through which he was passing on his way to the scene of his diplomatic labors, and to this privilege the learned court held that he was entitled, as representative of his sovereign, and also because it was necessary for his free and unimpeded exercise of his diplomatic duties.

This opinion of the Superior Court is in accord with that of

might only be sued in the Federal courts, act of 1789. (Rev. St. § 711, cl. 8); but this clause was repealed by act of Congress, Feb. 18, 1875, 18 St. L., p. 318, with the result that State and Federal courts now exercise concurrent jurisdiction in suits against consuls and vice consuls as appears from an excellent opinion of Mr. Justice Harrison, in the recent case of *Wilcox* v. *Luco*, 1898, 118 Cal. 639. In a note to this case in 45 Lawyer's Reports Annotated, 579, the exemptions and privileges of consuls are learnedly treated. — ED.

Wheaton, as set forth in his book on the Law of Nations, in which he has collected and condensed the views of numerous jurists of recognized authority on the subject. Wheaton's Law of Nations, p. 240 *et seq.*

This rule of international law derives support from the legal fiction that an ambassador is not an inhabitant of the country to which he is accredited, but of the country of his origin and whose sovereign he represents, and within whose territory he, in contemplation of law, always abides.

When, therefore, a claim is made against him in the country to which he is sent, for payment of a debt incurred by him, the creditor must proceed against him exactly as if he were not resident there, and as if he had not contracted the debt there, and as if he had no property there, in his quality of ambassador. Wheaton's Law of Nations, p. 242.

If he has contracted debts, and has no real property in the country to which he is sent, he should be requested to make payment, and, in case of refusal, application should be made to his sovereign; and as a necessary consequence of this rule of extraterritorial residence, he is always considered as retaining his original domicil, and may be proceeded against in the competent court of his own country, and he cannot set up the plea of absence in the service of the State as a bar to a suit in the domestic forum, since the law supposes him still to be present there.

From these views, I am led to the conclusion that the service made on Guzman Blanco in this case, and the judgment entered against him, are of no force and void.

The fact, rather suggested than positively averred in the complaint, that he was connected as a partner in a mercantile business in New York, is not material.

It does not appear that the cause of action arose out of that mercantile relation, or business, or out of any contract or transaction which arose in the State of New York, or the United States.

The motion to vacate the judgment against Guzman Blanco, and to set aside the service of the summons upon him, is granted, with ten dollars costs.[1]

[1] The arguments of counsel on rehearing are omitted: at the conclusion of these the order appealed from was affirmed in the following sentence: "Per Curiam. — Order affirmed with $10 costs, for the reasons assigned by Judge O'Gorman for granting the motion."

In the case of the *New Chili Gold Mining Co.* v. *Blanco & Another*, 1888, 4 Times Law, 346, the court took time to consider their judgment and delivered it in favor of the defendants, on the ground that, in the exercise of their judicial discretion, they did not consider it right to allow a foreign minister (Blanco), resident at a foreign

Section 9. — Immunities of Public Ships.

(a) *Ships of War.*

THE SCHOONER "EXCHANGE" v. M'FADDON & OTHERS.

Supreme Court of the United States, 1812.

(7 *Cranch*, 116.)

Appeal from the sentence of the circuit court of the United States for the district of Pennsylvania.

The schooner *Exchange*, owned by John M'Faddon and William Greetham, sailed from Baltimore, October 27, 1809, for St. Sebastians, in Spain. On the 30th of December, 1810, she was seized by the order of Napoleon Bonaparte; and was then armed and commissioned as a public vessel of the French government, under the name of *Balaou*. On a voyage to the West Indies, she put into the port of Philadelphia, in July, 1811, and on the 24th of August was libelled by the original owners. As no claimant appeared, Mr. Dallas, the attorney of the United States for the district of Pennsylvania filed (at the suggestion of the executive department of the United States, it is believed) a suggestion that inasmuch as there was peace between France and the United States, the public vessels of the former may enter into the ports and harbors of the latter and depart at will without seizure or detention in any way.

The district judge dismissed the libel, on the ground that a public armed vessel of a foreign power, at peace with the United States, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which the foreign sovereign claims to hold her.

The libellants appealed to the circuit court, where the sentence

court (France), to be sued in the courts of this country, at all events on a cause of action not arising in this country. The case was however, decided on another point.

The immunity of a diplomatic agent continues for a reasonable time after recall, *Dupont* v. *Pichon*, 1805, 4 Dall. 321; *Torladé* v. *Barrozo*, 1830, 1 Miles, Pa. 366; *Musurus Bey* v. *Gadban*, 1 Q. B. 533 (1894); same case on appeal, 2 Q. B. 352 (1894).

The authorities on this question are collected and analyzed in a note to *U. S.* v. *Ortega*, 1826, 11 Wheat. 467 as reported in 6 Lawyer's, Co-operative Ed. 522. — Ed.

was reversed—from the sentence of reversal, the district attorney appealed to this court.

MARSHALL, C. J.:—"This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.

"The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

"In exploring an unbeaten path, with few, if any aids, from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

"The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions.

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

"This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

"The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

"This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

"A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

"This full and absolute territorial jurisdiction being alike the at-

tribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, will be extended to him.

"This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

"1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

"If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

"Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case. Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

"2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

"Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed, his fiction of extra-territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

"This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

"The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and therefore a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain, privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

"In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

"3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

"In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted,

the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

"But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

"Without doubt a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be, in like manner conferred by such general permit. We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed?[1]

"It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce

[1] In *Neal Dow* v. *Johnson*, 1879, 100 U. S. 158, at 170, Field, J., speaking for the court, said: "The question here is, what is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law — the law of war — and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty." To the same effect, *Coleman* v. *Tennessee*, 1878, 97 U. S. 509, per Field, J. In like manner, a State court may not exercise jurisdiction for violation of a State statute in a military reservation, *Wills* v. *State*, 1871, 3 Heisk. (Tenn.), 141. — Ed.

a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and if not opposed by force, acquires no privileges by its irregular and improper conduct. It may, however, well be questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

"But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without a special license, into a friendly port. A different rule, therefore, with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.

"In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty bids him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. If would be difficult to assign a reason for withholding from a license thus granted, any immunity from local jurisdiction which would be implied in a special license.

"If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the court for distinguishing their case from that of vessels which enter by express assent. In all the cases of exemption which have been reviewed, much has been implied; but the obligation of

what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

"In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the court will not attempt to evade.

"These treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility if not correctness, that the same rule, and same principle are applicable to public and private ships; and since it is admitted that private ships, entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

"It is by no means conceded, that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily, and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudiced.

"Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted that the whole reasoning upon which such exemption has been implied in other cases, applies with full force to the exemption of ships of war in this.

"'It is impossible to conceive,' says Vattel, 'that a prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power, and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minis-

ter, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation.'

"Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

"To the court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

"The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, when implied, its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it must be supposed to act.

"When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption. But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of

a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and, it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

"Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign, entering a port open for their reception.

"Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

"Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is intrusted to govern.

"The only applicable case cited by Bynkershoek, is that of the Spanish ships of war, seized in Flushing for a debt due from the King of Spain. In that case the states generally interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released. This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships would appear to proceed from the same opinion.

"It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

"Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But, until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction.

"The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length which forbids a particular examination of these points.

"The principles which have been stated will now be applied to the case at bar.

"In the present state of the evidence and proceedings, the *Exchange* must be considered as a vessel which was the property of the libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the Emperor of France. The evidence of this fact is not controverted. But it is contended that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a right to assert his title in those courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

"If the preceding reasoning be correct, the *Exchange*, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country." [1]

THE "CONSTITUTION."

High Court of Admiralty, 1879.

(48 *Law Journal, P. D. & A.* 13.)

The facts are sufficiently stated in the opinion.

Sir Robert Phillimore:—"In this case an application was made to the court to allow a warrant to issue of a peculiar character—a warrant which was to be served upon a ship of war belonging to an independent state at amity with Her Majesty. The court directed the case to stand over, and suggested that it would be proper that notice should be given to his Excellency, the American Minister in London, and to Lord Salisbury, as Secretary for Foreign Affairs. The court has reason to congratulate itself that it took that step, for the result has been that it has had the advantage of hearing the opinion of counsel on behalf of the United States and of the learned gentleman representing the Crown. It appears from telegrams which have passed in the case that a claim has been made by the owner of the tug for 1,500*l.*, but that the American Consul at Portsmouth has forwarded simply a cheque for 200*l.*, in recognition of the services which the tug has rendered. The owner of the tug was dissatisfied with that amount; and consequently made an application to this court for an order to issue a warrant to arrest the *Constitution* and her cargo.

[1] See the *Sitka*, 1855 (C. Cushing), 7 Op. Atty.-Gen. 122. For a technical definition of a ship of war, and for the exact moment when a vessel in construction becomes a warship and entitled to rights, privileges, and immunities thereof, see *Tucker* v. *Alexandoff*, 1901, 183 U. S. 424, which is, broadly speaking, a commentary on the judgment and *dicta* of the principal case. For criticism on the case see 15 Harv. Law Rev. 657. — Ed.

"The question, therefore, which is raised under these proceedings is whether I have any jurisdiction to permit the arrest of a foreign ship of war belonging to an independent state in amity with our sovereign, and I hardly think that it can be denied that if I were to exercise the jurisdiction which is craved in the present case, I should be doing that for which there exists no direct precedent. On the contrary, I have no doubt as to this general proposition—that ships of war belonging to another nation with whom we are at peace are exempt from the civil jurisdiction of the courts of this country; and I have listened in vain for any peculiar circumstances which would take this case out of that general proposition. It has happened to me more than once to have been requested by foreign states to sit as arbitrator, and to make awards in differences which had arisen between them and British subjects. Had such an application been made in the present instance I would have gladly undertaken the duty sought to be imposed upon me; but that is not the state of matters I have now to consider. All that I have now to determine is the simple question of jurisdiction. Various cases have been cited before me in argument, all of which, with one exception, were discussed in the case of the *Charkieh*, but that was a wholly different case because the Khedive of Egypt was not an independent sovereign, and the *Charkieh* herself formed one of a fleet of merchantmen. I may in the lengthy judgment which I delivered in that cause, have let drop some expression which may have given rise to an impression that a foreign ship of war is liable to arrest, but, in that case this question, as it is here raised, had not to be decided. Now that it comes before me in this plain and simple form, I feel no doubt that it would be improper for me to accede to the request of the owner of the steam-tug, nor do I think, as I have said above, that the *Constitution* is liable to the process of this court. In regard to the question of the liability of the cargo, I must say I see no distinction between the issue of a warrant in the case of the ship and in the case of this cargo; it is on board a foreign vessel of war, and is under the charge of a foreign government for public purposes.

So that, having no authority to issue either of the warrants prayed for, and as no precedent exists for such a course, I must dismiss this motion with costs.[1]"

[1]Mr. Cobbett (Cases on International Law, 35,) says: "Before the decision in the case of the *Constitution*, some doubt seems to have existed as to whether salvage proceedings might not be instituted in the English Court of Admiralty against a public vessel. In the case of the *Charkieh*, Sir R. Phillimore had said, 'It is by no means clear that a ship of war to which salvage services have been rendered, may not, *jure gentium*, be liable to be proceeded against in the Court of Admiralty for the remuneration due for such services.'

(*b*) *Other Public Ships.*

THE "PARLEMENT BELGE."

COURT OF APPEALS, 1878.

(*Law Reports*, 5 *Probate Div.*, 197.)

On an appeal on behalf of the Crown from a decision of Sir Robert Phillimore, the judgment of the court, JAMES, BAGGALLAY, and BRETT, Lord Justices, by BRETT, L. J.[1] : — "In this case proceedings *in rem* on behalf of the owners of the *Daring* were instituted in the Admiralty Division, in accordance with the forms prescribed by the Judicature Act, against the *Parlement Belge*, to recover redress in respect of a collision. A writ was served in the usual and prescribed manner on board the *Parlement Belge*. No appearance was entered, but the Attorney-General, in answer to a motion to direct that judg-

"In a much earlier case, of the *Prins Frederik* (2 Dods., 451), a Dutch man-of-war, whilst on a voyage from Batavia to the Texel, was partially disabled by stress of weather off the Scilly Isles, and was brought into Mount's Bay with the assistance of the master and crew of a British brig, belonging to the port of Penzance. The *Prins Frederik* was at the time employed in bringing home a cargo of spice belonging to the Dutch Government, and for this purpose some of her guns had been removed. The salvors instituted salvage proceedings against the vessel, on the ground that she had for the time being, at least, lost the character and privileges of a public vessel, and also on the further ground that such proceedings being *in rem*, and not against the King of the Netherlands personally, were under any circumstances admissible. According to Lord Campbell, who quoted this case, in 1851 (17 Q. B., 212), Lord Stowell took a strong view against the asserted jurisdiction. To avoid difficulty, Lord Stowell caused a representation to be made to the Dutch government, who consented to his disposing of the matter as arbitrator. Acting under this authority, Lord Stowell awarded the sum of £800 and costs to the salvors."

Mr. Dana, in his note, No. 63, says : "It may be considered as established law, now, that the public vessels of a foreign state, coming within the jurisdiction of a friendly state, are exempt from all forms of process in private suits. Nor will such ships be seized, or in any way interfered with, by judicial proceedings in the name and by the authority of the state, to punish violations of public laws. In such cases, the offended state will appeal directly to the other sovereign. Any proceedings against a foreign public ship would be regarded as an unfriendly if not hostile act, in the present state of the law of nations."

It may be of interest to know that this is the frigate *Constitution*, so justly famous for its exploits in the war of 1812. See Hollis, The Frigate Constitution (1901), pp. 237–239. — ED.

[1] Statement of the Editor.

ment with costs should be entered for the plaintiffs, and that a warrant should be issued for the *Parlement Belge*, filed an information and protest, asserting that the court had no jurisdiction to entertain the suit. Upon the hearing of the motion and protest the learned judge of the Admiralty Division overruled the protest and allowed the warrant of arrest to issue. The Attorney-General appealed. The protest alleged that the *Parlement Belge* was a mail packet running between Ostend and Dover, and one of the packets mentioned in article 6 of the convention of the 17th of February, 1876, made between the sovereigns of Great Britain and Belgium; that she was and is the property of his Majesty the King of the Belgians, and in his possession, control and employ as reigning sovereign of the state, and was and is a public vessel of the sovereign and state, carrying his Majesty's royal pennon, and was navigated and employed by and in the possession of such government, and was officered by officers of the Royal Belgian navy, holding commissions, etc. In answer it was averred on affidavits, which were not contradicted, that the packet boat, besides carrying letters, carried merchandise and passengers and their luggage for hire. * * *

"The proposition raised by the first question seems to be as follows: Has the Admiralty Division jurisdiction in respect of a collision to proceed *in rem* against, and in case of non-appearance or omission to find bail, to seize and sell, a ship present in this country, which ship is at the time of the proceedings the property of a foreign sovereign, is in his possession, control, and employ as sovereign by means of his commissioned officers, and is a public vessel of his state, in the sense of its being used for purposes treated by such sovereign and his advisers as public national services, it being admitted that such ship, though commissioned, is not an armed ship of war or employed as a part of the military force of his country? * * *

"It is admitted that neither the sovereign of Great Britain nor any friendly sovereign can be adversely personally impleaded in any court of this country. It is admitted that no armed ship of war of the sovereign of Great Britain, or of a foreign sovereign can be seized by any process whatever, exercised for any purpose by any court of this country. But it is said that this vessel, though it is the property of a friendly sovereign in his public capacity and is used for purposes treated by him as public national services, can be seized and sold under the process of the Admiralty Court of this country, because it will, if so seized and sold, be so treated, not in a suit brought against the sovereign personally, but in a suit *in rem* against the vessel itself. This contention raises two questions; first, sup-

posing that an action *in rem* is an action against the property only, meaning thereby that it is not a legal proceeding at all against the owner of the property, yet can the property in question be subject to the jurisdiction of the court?

"Secondly, is it true to say that an action *in rem* is only and solely a legal procedure against the property, or is it not rather a procedure indirectly, if not directly, impleading the owner of the property to answer to the judgment of the court to the extent of his interest in the property? * * *

"Having carefully considered the case of the *Charkieh*, we are of opinion that the proposition deduced from the earlier cases in an earlier part of this judgment is the correct exposition of the law of nations, viz., that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.

"This proposition would determine the first question in the present case in favor of the protest, even if an action *in rem* were held to be a proceeding solely against property, and not a procedure directly or indirectly impleading the owner of the property to answer to the judgment of the court. But we cannot allow it to be supposed that in our opinion the owner of the property is not indirectly impleaded. The course of proceeding, undoubtedly, is first to seize the property. It is undoubtedly, not necessary, in order to enable the court to proceed further, that the owner should be personally served with any process. In the majority of cases, brought under the cognizance of an Admiralty Court, no such personal service could be effected. Another course was therefore taken from the earliest times. The seizure of the property was made by means of a formality which was as public as could be devised. That formality of necessity gave notice of the suit to the agents of the owner of the property, and so, in substance, to him. Besides which, by the regular course of the admiralty, the owner was cited or had notice to appear to show cause why his property should not be liable to answer to the complainant. The owner has a right to appear and show cause, a right which cannot be denied. It is not necessary, it is true, that the notice or citation should be personally served. But unless it were

considered that, either by means of the publicity of the manner of arresting the property, or by means of the publicity of the notice or citation, the owner had an opportunity of protecting his property from a final decree by the court, the judgment *in rem* of a court would be manifestly contrary to natural justice. In a claim made in respect of a collision the property is not treated as the delinquent *per se*. Though the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. This is conclusive to show that the liability to compensate must be fixed not merely on the property, but also on the owner through the property.

"If so, the owner is at least indirectly impleaded to answer to, that is to say, to be affected by, the judgment of the court. It is no answer to say that if the property be sold after the maritime lien has accrued, the property may be seized and sold as against the new owner.

"This is a severe law, probably arising from the difficulty of otherwise enforcing any remedy in favor of an injured suitor. But the property cannot be sold as against the new owner, if it could not have been sold as against the owner at the time when the alleged lien accrued. This doctrine of the Courts of Admiralty goes only to the extent, that the innocent purchaser takes the property subject to the inchoate maritime lien which attached to it as against him who was the owner at the time the lien attached. The new owner has the same public notice of the suit and the same opportunity and right of appearance as the former owner would have had. He is impleaded in the same way as the former owner would have been. Either is affected in his interests by the judgment of a court which is bound to give him the means of knowing that it is about to proceed to affect those interests, and that it is bound to hear him if he objects. That is, in our opinion, an impleading.

"The case of *The Bold Buccleugh* does not decide to the contrary of this. It decides that an action *in rem* is a different action from one *in personam* and has a different result. But it does not decide that a court which seizes and sells a man's property does not assume to make that man subject to its jurisdiction. To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded any more than he could be directly impleaded. The case is, upon

this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court.

"But it is said that the immunity is lost by reason of the ship having been used for trading purposes. As to this, it must be maintained either that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes, or that a use of her in part for trading purposes takes away the immunity, although she is in possession of the sovereign authority by the hands of commissioned officers, and is substantially in use for national purposes. Both these propositions raise the question of how the ship must be considered to have been employed.

"As to the first, the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of the *Exchange*. Whether the ship is a public ship used for national purposes seems to come within the same rule. But if such an inquiry could properly be instituted it seems clear that in the present case the ship has been mainly used for the purpose of carrying the mails, and only subserviently to that main object for the purposes of trade. The carrying of passengers and merchandise has been subordinated to the duty of carrying the mails. The ship is not, in fact, brought within the first proposition. As to the second, it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the state which he represents. If the remedy sought by an action *in rem* against public property is, as we think it is, an indirect mode of exercising the authority of the court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner. The property cannot, upon the hypothesis, be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subor-

dinately and partially for trading purposes does not take away the general immunity. For all these reasons, we are unable to agree with the learned judge, and have come to the conclusion that the judgment must be reversed." [1]

Section 10. — Merchant Vessels.

WILDENHUS' CASE.

Supreme Court of the United States, 1886.

(120 *United States*, 1.)

While the Belgian steamer *Noordland* was moored to a dock in Jersey City, New Jersey, an affray arose between decks in which Joseph Wildenhus killed one Fijeus. Wildenhus was arrested by the Jersey City authorities; whereupon the Belgian consul applied to the U. S. Circuit Court for New Jersey, for his release upon a writ of *habeas corpus*.

The court refused to deliver the prisoner and to reverse that decision. An appeal is taken to the U. S. Supreme Court.[2]

Mr. Chief Justice Waite delivered the opinion of the court.

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade,

[1] In the case of *Briggs* v. *Light-Boats* in the Supreme Court of Massachusetts, 1865 (11 Allen, 157), the plaintiff had built some floating lights for the United States government, and had delivered them and received the contract price; and the title to them had vested in the United States, subject to the builder's lien. The plaintiff now sought to enforce his lien.

Gray, J., says, in the course of his judgment, "wherever the question has been raised, courts of admiralty have generally declined to take jurisdiction of a libel *in rem* against a public ship, without the consent of the government. In every aspect in which we can look at these suits, in the lights of principle or of authority, we cannot escape the conclusion that the state courts have no jurisdiction or right to entertain them."

Mr. Justice Gray's opinion, from which the above extracts are taken, gives a learned and exhaustive account of the origin and development of the doctrine that the sovereign may not be sued without his consent (pp. 166–186). — Ed.

[2] A short statement is substituted for that of the reporter, and part of the opinion is omitted. — Ed.

it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange*, 7 Cranch, 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such * * * merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." *United States* v. *Diekelman*, 92 U. S. 520; 1 Phillimore's International Law, (3d Ed.) 483, § 351; Twiss' Law of Nations in Time of Peace, 229, § 159; Creasy's International Law, 167, § 176; Halleck's International Law, (1st Ed.) 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. *Regina* v. *Cunningham*, Bell. C. C. 72; S. C. 8 Cox C. C. 104; *Regina* v. *Anderson*, 11 Cox C. C. 198, 204; S. C. L. R. 1 C. C. 161, 165; *Regina* v. *Keyn*, 13 Cox C. C. 403, 486, 525, s. c. 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights

and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions.

The first of these conventions entered into by the United States after the adoption of the Constitution was with France, on the 14th of November, 1788, 8 Stat. 106, "for the purpose of defining and establishing the functions and privileges of their respective consuls and vice-consuls," Art. VIII. of which is as follows:

"The consuls or vice-consuls shall exercise police over all the vessels of their respective nations, and shall have on board the said vessels all power and jurisdiction in civil matters, in all the disputes which may there arise; they shall have an entire inspection over the said vessels, their crew, and the changes and substitutions there to be made; for which purpose they may go on board the said vessels whenever they may judge it necessary. Well understood that the functions hereby allowed shall be confined to the interior of the vessels, and that they shall not take place in any case which shall have any interference with the police of the ports where the said vessels shall be."

It was when this convention was in force that the cases of *The Sally* and *The Newton* arose, an account of which is given in Wheaton's Elements of International Law (3d ed.), 153, and in 1 Phillimore's International Law (3d ed.), 484 and (2d ed.), 407. *The Sally* was an American merchant vessel in the port of Marseilles, and *The Newton* a vessel of a similar character in the port of Antwerp, then under the dominion of France. In the case of *The Sally*, the mate, in the alleged exercise of discipline over the crew, had inflicted a severe wound on one of the seamen, and in that of *The Newton* one seaman had made an assault on another seaman in the vessel's boat. In each case the proper consul of the United States claimed exclusive jurisdiction of the offence, and so did the local authorities of the port; but the Council of State, a branch of the political department of the government of France, to which the matter was referred, pronounced against the local tribunals, "considering that one of these cases was that of an assault committed in the boat of the American ship *Newton*, by one of the crew upon another, and the other was that of a severe wound inflicted by the mate of the American ship *Sally* upon one of the seamen for having made use of the boat without leave." This was clearly because the things done were not such as to disturb "the peace or tranquillity of the port." Wheaton's Elements of International Law (3d ed.), 154. The case of *The Sally* was simply a quarrel between certain of the crew while con-

structively on board the vessel, and that of *The Newton* grew out of a punishment inflicted by an officer on one of the crew for disobedience of orders. Both were evidently of a character to affect only the police of the vessel, and thus within the authority expressly granted the consul by the treaty.[1]

The treaty [with Belgium, 1881] is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offence which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done — the disorder that has arisen — on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the "public repose" of the people who look to the State of New Jersey for their protection. If the thing done — "the disorder," as it is called in the treaty — is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they as a rule care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature to the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a "disorder" the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose peo-

[1] A murder was committed by one Frenchman upon another, on board a French merchant vessel, at anchor in a Mexican port; held that it is not necessarily a disturbance of the peace of the port, and therefore the Mexican courts would not assume jurisdiction of the case, *L'Anemone*, Supreme Ct. of Mexico, 1875 (Journal de Droit International Privé, 1876, p. 413). — Ed.

ple have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a "disorder" which will "disturb tranquillity and public order on shore or in the port." The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished, by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it. That, according to the petition for the *habeas corpus*, is this case.

This is fully in accord with the practice in France, where the government has been quite as liberal towards foreign nations in this particular as any other, and where, as we have seen in the cases of *The Sally* and *The Newton*, by a decree of the Council of State, representing the political department of the government, the French courts were prevented from exercising jurisdiction. But afterwards, in 1859, in the case of Jally, the mate of an American merchantman who had killed one of the crew and severely wounded another on board the ship in the port of Havre, the Court of Cassation, the highest judicial tribunal of France, upon full consideration held, while the Convention of 1853 was in force, that the French courts had rightful jurisdiction, for reasons which sufficiently appear in the following extract from its judgment:[1]

"Considering that it is a principle of the law of nations that every state has sovereign jurisdiction throughout its territory;

"Considering that by the terms of Article 3 of the Code Napoleon the laws of police and safety bind all those who inhabit French territory, and that consequently foreigners, even *transeuntes*, find themselves subject to those laws;

"Considering that merchant vessels entering the port of a nation other than that to which they belong cannot be withdrawn from the territorial jurisdiction, in any case in which the interest of the state of which that port forms part finds itself concerned, without danger to good order and to the dignity of the government;

"Considering that every state is interested in the repression of

[1] Usually cited as the case of the *Tempest*. — Ed.

crimes and offences that may be committed in the ports of its territory, not only by the men of the ship's company of a foreign merchant vessel towards men not forming part of that company, but even by men of the ship's company among themselves, whenever the act is of a nature to compromise the tranquillity of the port, or the intervention of the local authority is invoked, or the act constitutes a crime by common law," (*droit commun*, the law common to all civilized nations), "the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignty, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory." 1 Ortolan Diplomatie de la Mer (4th ed.), pp. 455, 456; Sirey (N. S.), 1859, p. 189.

The judgment of the Circuit Court is affirmed.

THE "RELIANCE."

U. S. CIRCUIT COURT FOR SO. DIST. OF N. Y., 1848.

(1 *Abbott's Adm. Rep.*, 317.)

This was a libel *in rem* filed by the owner, master and crew of the bark *Reliance* against One Hundred and Ninety-four shawls salved by the libellants from the wreck of the *Lady Kenneway* to recover salvage compensation.

The *Reliance* was a British vessel which left Liverpool bound to New York. Near the coast of England, she fell in with the *Lady Kenneway* and boarded her, finding no person on board.

The *Lady Kenneway* was a British East Indiaman, owned in London, on her way to London from Bombay. The master of the *Reliance* ordered several cases containing shawls to be taken from her, and then abandoned her. The *Reliance* pursued her way to New York, where she arrived December 1, 1847.

A libel was filed against the chief part of the articles brought from the *Lady Kenneway*. The British consul, by leave of the court, intervened in behalf of the unknown British owners, praying the court to order restitution for their benefit of the property attached, after allowing the libellants a reasonable salvage, if, in the judgment of the court, "they proved a case of derelict, and their consequent right to salvage."

The individual claimants, as well as the consul, set up defenses against the award of salvage, charging waste, damage, and destruction of the apparel and stores of the vessel.

It is insisted that the court should decline jurisdiction in the case, because the *Lady Kenneway* was an English vessel, then on a homeward voyage, with her cargo for an English market, and the *Reliance* at the time, was an English vessel, with a British crew on board, who had signed British articles and that accordingly both vessels and libellants were bound to return to terminate the voyage at a British port.[1]

BETTS, J.— " * * * As a general principle, the citizens or subjects of the same nation have no right to invoke a foreign tribunal to adjudicate between them, as to matters of tort or contract solely affecting themselves. It rests in the discretion of the court, whose authority is invoked, to determine whether it will take cognizance of such matters or not. * * *

"As maritime courts proceed upon a common rule of right and compensation in salvage cases, the question of jurisdiction in that class of actions will seldom be raised or regarded before them.

"The courts will take cognizance of those cases as matters of course, if either party is territorially within the jurisdiction of the court; and the property being brought within their jurisdiction, although the salvors and claimants may be citizens or subjects of different nations, the court will unhesitatingly dispose of the subject, if satisfied that the whole right is before it,—salvage being essentially a question of the *jus gentium*. * * *

"I find no authority of weight which imposes on the courts of our country the necessity of determining controversies between foreigners resident abroad, either in common-law actions, transitory in their nature, or maritime proceedings when the remedy is *in rem*.

"If the doctrine were peremptory, imparting to suitors the right to such aid, and imposing on courts the obligation to afford it, actions for supplies and materials, on charter-parties and bills of lading, or by mechanics for labor, would be comprehended within the class, equally with suits for wages on bottomry bonds or for salvage compensation.

"I am satisfied the law is not so. In my judgment it would be lamentable if courts were compelled to defer the business of the citizens of the country to bestow their time in litigation between parties owing no allegiance to its laws, and contributing in no way to its support. Should it transpire, in the progress of the litigation,

[1] Statement of the case is shortened. — ED.

that the law of the domicile of the parties must be ascertained in order to adjudge rightly on their claims, or that witnesses must be examined there to fix the facts in controversy, the court might be compelled to suspend its movement and wait until these cardinal particulars could be supplied from abroad. Every tribunal experiences the inconvenience and unsatisfactoriness of so settling controversies between those even who can have no other means of redress, and will recognize the value of the principle which enables them, in regard to foreigners, to remit their controversies to their home tribunals, where the law is known, and the facts can be more surely determined. This court has, in repeated instances, acted upon this acceptation of the law; and believing it to be the sound and safe rule, I shall adhere to it in all cases authorizing that exercise of discretion.

"The question to be considered is, whether, in this case, the rights of parties would be best promoted by retaining the case and disposing of the subject here, or by remitting it to the home courts of the salvors and claimants.

"The answer advances many grave imputations against the conduct of the master and seamen on board the wreck and after the property came into their possession, and these charges are not without color of proof to support them. Their case does not, accordingly, come before the court with the most persuasive claims to its interposition and favor. When salvage services are eminently meritorious, and the only inquiry to be made is the rate of award to be allotted, Admiralty Courts would be solicitous to give every practicable despatch to suits by the salvors, and relieve them both from delay and expense in obtaining their just reward. It would scarcely occur that any court would withhold its aid from such suitors. It is quite different when the foreign owner of the property charges his fellow-subject with embezzlement and spoliation, and other wanton misconduct in respect to it, and prays the privilege to contest his claim to compensation before the authorities of their common country. * * *

"The termination of the voyage of the *Reliance* was in England, where it is to be presumed she would arrive within a short period after leaving this port, and it is most fitting that the question of the obligations and privileges of her master and crew, in respect to services rendered a British vessel, a wreck or in distress on the English coast, should be determined in the courts of that nation. * * *

"As the libellants may not reclaim the property attached in their behalf, the decree will make provision enabling the claimants who have intervened in their own right, and the British Consul in behalf

of unknown owners, to take the goods out of court and ship them to their port of destination." [1]

[1] In the case of *Aertsen* v. *Ship Aurora* (1800), Bee's Adm. Reports, 161, the suit was brought for seamen's wages and to obtain a discharge on account of the captain's ill treatment. In the course of the judgment the judge said: "From this evidence I do not find sufficient evidence to entitle these three men to their discharge (from the completion of the voyage).

"(1) Because no unlawful weapon was used.

"(2) Sufficient provocation for the captain's acts.

"This is the case of a neutral vessel, the crew of which are bound by their articles to return to Hamburgh, before they are entitled to receive their wages, and the 12th of those articles stipulates that everything *not* specified therein shall be regulated according to the marine law of Hamburgh for regulating the conduct of officers and seamen aboard vessels belonging to that place."

The suit was dismissed with costs.

In *Willendson* v. *The Försöket*, 1 Peter's Adm., 197, the plaintiff, a sailor on a Danish ship, cited his captain on a claim for wages. The judge, in the course of his opinion, says that his general rule has been not to take cognizance of disputes between masters and crews of foreign ships.

"I have," said he, "* * * in peculiar cases * * * compelled the payment of wages * * * assisted in recovering deserters * * * (and in) reducing to obedience perverse and rebellious mariners.

"In the case now before me I see no cause to warrant my taking cognizance. It is the duty of the master to return the seaman to his own country. This he offers to do. * * * He must give the sailor a certificate of forgiveness of past offenses, to avail him in his own country. * * * If * * * there shall appear no deception in the present offer (to carry the seaman home) I shall not further interfere, but dismiss the suit."

Mr. Hamilton Fish, Secretary of State, in a dispatch to General Schenck, United States Minister in London (November 8, 1873), said: "Referring to the case of Albert Allen Gardner, master of the American ship *Anna Camp*, tried in the County Court at Liverpool, in May last, copies of certain papers relating to which were forwarded to you by General Badeau, I desire to call your attention to the claim of jurisdiction put forth by the local common-law courts of Great Britain in this and other similar cases.

"It seems to be claimed by the courts in question that their jurisdiction extends to the hearing and determining of causes arising upon complaints between masters and mariners of vessels of the United States, not only where the occurrences upon which the complaint may be founded took place within British ports or waters, but also when the offense which is made the ground of action was committed on board the vessel on the high seas.

"The exercise of this jurisdiction by the common-law courts at Liverpool has already been the cause of much annoyance and in some instances serious inconvenience to masters and owners of American vessels, and if persisted in may affect injuriously the interests of American shipping."

Mr. Fish proceeds to quote from the decision of Judge BETTS, in the case of the *Reliance*, and to commend the principles there set forth as the only proper rule to be followed.

Compare the following two decisions in cases of merchant ships for alleged infringements of patent rights: *Caldwell* v. *Van Vlissengen*, 1851, 9 Hare, 415, in which the vessel was restrained from using the patent, and *Brown* v. *Duchesne*, 1857, 19 How. 183, in which the court refused its aid to the American patentee. — ED.

ELLIS v. MITCHELL.

SUPREME COURT OF HONG KONG, 1874.

(*U. S. Foreign Relations*, 1875, 600.)

Judgment, SMALL, C. J.:—

"Our decision in this appeal having been for some time come to, we handed to the registrar our concluded judgment and by our direction he gave it out on the 7th of November last. That decision was in the following terms: 'We have fully considered all the facts in this case and the very able arguments which, on the part of the appellant, Mr. Kingsmill submitted to us. The respondent did not appear. We are of opinion that the appellant has failed to show that the decision in the summary branch of this court is wrong. It is our duty, therefore, to dismiss this appeal.' The respondent has incurred no costs; we say nothing as to costs. Some questions as to the duties and jurisdiction of consuls have arisen in this case to which we should wish to advert, but as these questions arise out of this case, rather than lead up to our decision, we purpose at a more convenient opportunity to refer to them. It seems to us that a somewhat exaggerated notion as to the duties and jurisdiction of consuls in this colony is prevalent.

"The grounds and reasons for the decision in this case were very carefully considered and conferred on between us. We were agreed in the conclusion that the appeal must be dismissed. In order that the parties might not be kept longer in suspense, we directed the decision which I have just read to be given out by the registrar on the 7th day of November, as I have already said. There seems to have been a grave misapprehension that this case came before Mr. Justice Snowden as an appeal from the decision of the consul of the United States.

"It was not so. From the first it was treated by the learned judge as being untouched by decision, and, indeed, as a matter entirely *ultra vires* the consul of the United States. True it is that a discharge of the plaintiff from the ship, and an account taken in the presence of the consul of wages earned, were produced and relied on by the defendant, the master of the ship, as an answer to the plaintiff's claim; but it was held in the summary branch of this court, upon the evidence before it, that in no way was the consul acting or intervening judicially, either as to the discharge, or as to the account. No claim for unlawful dismissal had been raised before the consul.

It might have been properly raised before the proper judicial tribunal of and within the United States; but no evidence was adduced to show that that authority was vested by the law of the United States in the consul here. Even if it had been so vested by any such law of the Union, it required the force of a treaty, and an act of Parliament, or local ordinance, to enable the consul to exercise any extra-territorial judicial power within British territory. Although some instructions to the consuls were produced to the court, no act of Congress was produced, nor was there any evidence that there was any such act, or common-law power in a consul. According to Chancellor Kent's Commentaries, vol. I., p. 50, *et seq.*, 'consuls are commercial agents. * * * In some places they have been invested with judicial powers over disputes between their own merchants in foreign ports; but in the commercial treaties made by Great Britain there is rarely any stipulation for clothing them with judicial authority, except in treaties with the Barbary powers. And in England it has been held that a consul is not strictly a judicial officer, and they have there no judicial power.' He cites *Waldron* v. *Combe*, 3 Taunton, 162. The words of the Chief-Justice MANSFIELD there are, 'The vice consul is no judicial officer.' At page 51 the very learned chancellor proceeds: 'No government can invest its consuls with judicial power over their own subjects in a foreign country without the consent of the foreign government, founded on treaty.' At page 52, he says: 'It is likewise made their duty (*i. e.* of consuls), where the laws of the country permit, to administer on the personal estates of American citizens dying within their consulates,' etc. And in note (6) he says, 'American consuls cannot take cognizance of the offenses of seamen in foreign ports, nor exempt the master from his own responsibility.' He cites Ware's Reports (American), 367. And to conclude all, he says at page 53: 'The consular convention between France and this country (*i. e.* the United States) in 1778 allowed consuls to exercise police over all vessels of their respective nations within the interior of the vessels, and to exercise a species of civil jurisdiction by determining disputes concerning wages, and between the master and crews of vessels belonging to their own country. The jurisdiction claimed under the consular convention with France was merely voluntary, and although exclusive of any coercive authority, and we (*i. e.* the United States) have no treaty at present which concedes even such consular functions.' We quote the 9th edition of Kent's Commentaries (1858). We have before us the valuable work of Judge Bouvier, the law-dictionary, the 4th edition of 1872, and in it we find nothing to vary all that Chancellor Kent asserts. Parsons' Law of Shipping, pub-

lished in 1869, is to the same effect. One quotation from Parsons, vol. II., p. 56.

"He there says, 'a discharge (*i. e.* of a seaman,) when made in a foreign port, is required to be made before the consul; but the payment of wages already due is not.' And this to such an extent that the learned author adds, 'and the consul has no right to charge a commission for witnessing the settlement,' in other words, he has nothing to do with the settlement of the wages due; *a fortiori* he has no authority in reference to damages for breach of contract, or otherwise, between the master and the seaman. Now, if the consul has no such authority, the authority must be somewhere, and it cannot be contended, upon any grounds of which we are aware, that this court has not the fullest authority over all such disputes. It is quite clear that the legislature of this country can, by statute or ordinance, give extra-territorial powers to consuls, but as all such powers are in derogation of the royal prerogative all such laws must be construed strictly. It appears to us that ordinance No. 4, of 1850, has no bearing on the question before us. It relates to cases of desertion from ships, and to nothing else. Ordinance No. 6, of 1862, is prohibitory. It says that no British seaman shall be discharged elsewhere than at the harbor-master's office, and that every seaman discharged from a foreign ship, represented by a consul here, 'shall, within twenty-four hours of being discharged at the office of his consul, or vice-consul, produce at the harbor-master's office a certificate of his discharge.' Now, this is not an enabling statute, and it gives no power to any consul which he had not before. All it does is to assume that every discharge of a foreign seaman will have been given at the office of the consulate of his country. But for legislation the discharge of a seaman is a matter between master and seaman only. No treaty has been produced, no act of Parliament or ordinance other than those above cited, has been brought to the notice of this court. In the absence of any such we are driven back to the international law, as laid down by Chancellor Kent, page 51, that the consul of the United States is not a judicial officer, 'that they have no judicial power' and, page 53, that there is no treaty with the United States which authorizes consuls to exercise a species of jurisdiction by determining disputes concerning wages between masters and crews belonging to their own country in this colony. We conclude, therefore, that the consul of the United States has no judicial powers or authority whatever in this colony as to wages or damages for wrongs, between United States masters and seamen, which the judicial authorities here can recognize, but that this court must decide such questions when brought before it.

"What we have said as to the consul of the United States applies to consuls from all other foreign states. No such claim is, we believe, set up in any other part of the British dominions. In China, every consul of every foreign power has judicial authority over its own subjects; but this extra-territorial jurisdiction is the result of express treaty, and is conferred on them by the enactments of the legislative authority of each foreign state. The exaggerated notion as to consular authority here has probably arisen from the powers conceded to them in China, but which are not conceded here.

"In a colony so distant as Hong-Kong is from London, convenience has rendered direct communication between the colonial government and consuls here on many subjects properly diplomatic, convenient for all parties. This has probably tended to induce an overestimate of the position of consuls here in reference to judicial authority. We feel great respect for the consuls in this colony, both officially and personally, but we must see that the authority of this court is not curtailed beyond what the law permits. If circumstances render it proper or convenient that judicial authority should in this colony vest in consuls, it must be obtained by treaty and legislation. This court has no power to concede it."[1]

[1] "As a matter of law, foreign consuls have no jurisdiction within the territory of the United States, except by force of treaty stipulations. See Wheat. Int. Law, 217. The judicial power of a consul depends upon the treaties between the nations concerned and the laws of the nation the consul represents. *Dainese* v. *Hale*, 91 U. S. 13. See the *Elwine Kreplin*, 9 Blatchf. 438. Consular jurisdiction depends on the general law of nations subsisting treaties between the two governments affected by it, and upon the obligatory force and activity of the rule of reciprocity. 2 Op. Atty.-Gen. 378.

"We conclude, therefore, that neither under international law, nor under the statute law of the United States, has a consular officer of a foreign government a right to sit as judge or arbitrator within our territory, and render decrees or orders affecting personal liberty, which orders or decrees the courts of the United States are authorized or required to enforce, unless the consent of the United States to such jurisdiction has been given either by express statute or treaty stipulation." Pardee, J., in *Re Aubrey*, 1885, 26 Fed. 848, 851.

For the jurisdiction exercised by consuls in semi-civilized and non-christian countries, see *Dainese* v. *U. S.*, 1879, 15 Ct. Cl. 64 (an elaborate discussion of the question); and the following valuable opinions of C. Cushing: 7 Op. Atty.-Gen. 18, 342. See also U. S. Rev. St. §§ 4083–4086; 4087–4089. — Ed.

IN RE ROSS.

United States Supreme Court, 1890.

(140 *United States*, 453.)

One John M. Ross served in 1880 as seaman on board the American ship *Bullion*, in the waters of Japan. While the vessel lay at anchor in the harbor of Yokohama, he assaulted Robert Kelley, second mate of the *Bullion*, with a knife, inflicting in his neck a mortal wound of which he died in a few minutes, on the deck of the ship. Ross was at once arrested by direction of the master of the vessel, placed in irons, taken ashore, and confined in jail at Yokohama. The master filed a complaint with the American Consul General of Yokohama, charging Ross with murder, and he was tried and convicted thereof in the American Consular Court of Japan. His sentence was commuted by the President of the United States to life imprisonment in the Penitentiary at Albany. In 1890 he applied to the United States Circuit Court for the Northern District of New York for a writ of *habeas corpus* for his discharge, which was duly issued. On hearing, the court denied the motion of the prisoner for his discharge and remanded him to the penitentiary. From that order, an appeal was taken to the Supreme Court.[1]

Mr. George W. Kirchwey, for appellant.

Mr. Assistant Attorney-General Parker, for appellee.

Mr. Justice Field delivered the opinion of the court.[2]

The Circuit Court did not refuse to discharge the petitioner upon any independent conclusion as to the validity of the legislation of Congress establishing the consular tribunal in Japan, and the trial of Americans for offences committed within the territory of that country, without the indictment of a grand jury, and without a trial by a petit jury, but placed its decision upon the long and uniform acquiescence by the executive, administrative, and legislative departments of the government in the validity of the legislation. Nor did the Circuit Court consider whether the status of the petitioner as a citizen of the United States, or as an American within the meaning of the treaty with Japan, could be questioned, while he was a seaman of an American ship, under the protection of the American flag, but simply stated the view taken on that subject by the minister to Japan, the

[1] Shortened statement substituted for that of the original report. — Ed.

[2] Part of the judgment is omitted. — Ed.

State Department, and the President. Said the court: "During the thirty years since the statutes conferring the judicial powers on ministers and consuls, which have been referred to, were enacted, that jurisdiction has been freely exercised. Citizens of the United States have been tried for serious offences before these officers, without preliminary indictment or a common-law jury, and convicted and punished. These trials have been authorized by the regulations, orders, and decrees of ministers, and it must be presumed that the regulations, orders, and decrees of ministers prescribing the mode of trial have been transmitted to the Secretary of the State, and by him been laid before Congress for revision, as required by law. Unless the petitioner was not properly subject to this jurisdiction because he was not a citizen of the United States, his trial and sentence were in all respects modal, as well as substantial, regular, and valid under the laws of Congress, according to the construction placed upon these statutes by the acquiescence of the executive, administrative, and legislative departments of the government for this long period of time."

Under these circumstances the Circuit Court was of opinion that it ought not to adjudge that the sentence imposed upon the petitioner was utterly unwarranted and void, when the case was one in which his rights could be adequately protected by this court, and when a decision by the Circuit Court setting him at liberty, although it might be reversed, would be practically irrevocable.

The Circuit Court might have found an additional ground for not calling in question the legislation of Congress, in the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries, or to invest their consuls with judicial authority, which is the same thing, for the trial of their own subjects or citizens for offences committed in those countries, as well as for the settlement of civil disputes between them; and in the uniform recognition, down to the time of the formation of our government, of the fact that the establishment of such tribunals was among the most important subjects for treaty stipulations. This recognition of their importance has continued ever since, though the powers of those tribunals are now more carefully defined than formerly. *Dainese* v. *Hale*, 91 U. S. 13.

The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the Middle Ages. During those ages these commercial magistrates, generally designated as consuls, possessed to some extent

a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offences. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people.

The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an undue accusation or an unfair trial, secured by the Constitution to citizens of the United States at home, should be enjoyed by them abroad. In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offence of that grade committed in those countries, or to secure a jury on the trial of the offence. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period.

It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not

for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook* v. *United States*, 138 U. S. 157, 181. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture. Letter of Mr. Cushing to Mr. Calhoun of Sept. 29, 1844, accompanying President's message communicating abstract of treaty with China, Senate Doc. 58, 28th Cong. 2d Sess.; Letter on Judicial Exterritorial Rights by Secretary Frelinghuysen to Chairman of Senate Committee on Foreign Relations of April 29, 1882, Senate Doc. 89, 47th Cong. 1st Sess.; Phillimore on Int. Law, Vol. 2, part 7; Halleck on Int. Law, c. 41.

We turn now to the treaties between Japan and the United States.

The treaty of June 17, 1857, executed by the consul general of the United States and the governors of Simoda, is the one which first conceded to the American consul in Japan authority to try Americans committing offences in that country. Article IV. of that treaty is as follows:

"ART. IV. Americans committing offences in Japan shall be tried by the American consul general or consul, and shall be punished according to American laws. Japanese committing offences against Americans shall be tried by the Japanese authorities and punished according to Japanese laws." 11 Stat. 723.

Our government has always treated Article IV. of the treaty of 1857 as continuing in force, and it is published as such in the United States Consular Regulations, issued in 1888. Appendix No. 1, p. 313. Its official interpretation is found in Article 71 of those regulations, which declares that "consuls have exclusive jurisdiction over crimes and offences committed by citizens of the United States in Japan." Mr. Bingham, our minister to that country for several years after the treaty of 1858, always assumed the incorporation into that treaty of all the provisions of the treaty of 1857, or that they were saved by it. When the prisoner reached San Francisco, on his way from Japan to Albany, he applied to the Circuit Court of the United States for a writ of *habeas corpus*, and cited the sixth article of the treaty of 1858, insisting that it only provided for the trial of Americans by American Consular Courts in Japan for offences committed against Japanese, and therefore he could not be held to answer for the murder of the second officer of the American ship *Bullion*, when in Japanese waters, because he was not a Japanese subject. In a communication made under date of June 8, 1881, by the minister to the Secretary of State, reference is made to this position, and the following language is used: "Nothing, in my opinion, could more strongly testify to the utter weakness of the claim made for Ross against the government than this attempt to limit the jurisdiction of our consuls in Japan over Americans, guilty of crimes by them committed within this empire, to such crimes only as they should commit upon the persons of Japanese subjects. According to this logic, Americans may in Japan murder each other and the citizens or subjects of all lands save the subjects of Japan with impunity — as it is admitted by this government that it cannot try an American for any offence whatever — and it must also be conceded that the tribunals of no other government than our own can try Americans for crimes by them committed within this empire. In giving my reasons to the department for sustaining the jurisdiction of the United States in this case, and for approving

as I did the conviction of Ross, in which the consul general and the four associates who sat with him had concurred, I cited Article IV. of our convention of 1857 with Japan, to wit: 'That Americans committing offences in Japan shall be tried by the American consul general or consul, and shall be punished according to American law.' This provision of the convention of 1857 and all other provisions thereof were saved and incorporated in our treaty of 1858 with Japan, Article XII. [quoted above]. You will observe that Mr. Townsend Harris was the consul general of the United States who negotiated both of these treaties with Japan, and that the treaty of 1858 was ratified April 12, 1860, and that thereafter, to wit, June 22, 1860, Congress passed the act to carry into effect this treaty with Japan, and provided that the minister and consuls of the United States in Japan be 'fully empowered to arraign and try in the manner (in said statute provided) all citizens of the United States charged with offences against law committed' (by them in Japan); [sec. 4084, Rev. Stat.]; and also by section 4086 provided that the jurisdiction in both civil and criminal matters in Japan shall 'in all cases be exercised and enforced in conformity with the laws of the United States, which so far as necessary to execute such treaty are extended over all citizens of the United States therein, and over all others to the extent the terms of the treaty justify or require.' Here was the construction above stated by me asserted by the same Senate which ratified the treaty, and by the same President who approved both the treaty and the act of Congress. The President and the department have always construed the treaty of 1858 as carrying with it and incorporating therein the fourth article and all other provisions of the convention of 1857."

The legislation of Congress to carry into effect the treaty with Japan is found in the Revised Statutes, in sections most of which apply equally to treaties with China, Siam, Egypt, and Madagascar (secs. 4083–4091). Confining ourselves to the treaty with Japan only, we find that the legislation secures a regular and fair trial to Americans committing offences within that empire.

It enacts that the minister and consuls of the United States, appointed to reside there, shall, in addition to other powers and duties imposed upon them respectively, be invested with the judicial authority therein described, which shall appertain to their respective offices and be a part of the duties belonging thereto, so far as the same is allowed by treaty; and empowers them to arraign and try, in the manner therein provided, all citizens of the United States charged with offences against law committed in that country, and to sentence such offenders as therein provided, and to issue all suitable and neces-

sary process to carry their authority into execution. It declares that their jurisdiction in both criminal and civil matters shall in all cases be exercised and enforced in conformity with the laws of the United States, which, so far as necessary to execute the treaty and suitable to carry it into effect, are extended over all citizens of the United States in Japan, and over all others there to the extent that the terms of the treaty justify or require. It also provides that where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others; and that if neither the common law, nor the law of equity, or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the minister shall, by decrees and regulations, which shall have the force of law, supply such defects and deficiencies. Each of the consuls is authorized, upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offence against law; and to arraign and try any such offender; and to sentence him to punishment in the manner therein prescribed.

The legislation also declares that insurrection or rebellion against the government, with intent to subvert the same, and murder, shall be punishable with death, but that no person shall be convicted thereof unless the consul and his associates in the trial all concur in the opinion, and the minister approves of the conviction. It also provides that whenever in any case the consul is of opinion that, by reason of the legal questions which may arise therein, assistance will be useful to him, or that a severer punishment than previously specified in certain cases will be required, he shall summon to sit with him on the trial one or more citizens of the United States, not exceeding four, and in capital cases not less than four, who shall be taken by lot from a list which has been previously submitted to and approved by the minister, and shall be persons of good repute and competent for the duty.

The jurisdiction of the consular tribunal, as is thus seen, is to be exercised and enforced in accordance with the laws of the United States; and of course in pursuance of them the accused will have an opportunity of examining the complaint against him, or will be presented with a copy stating the offence he has committed, will be entitled to be confronted with the witnesses against him and to cross-examine them, and to have the benefit of counsel; and, indeed, will

have the benefit of all the provisions necessary to secure a fair trial before the consul and his associates. The only complaint of this legislation made by counsel is that, in directing the trial to be had before the consul and associates summoned to sit with him, it does not require a previous presentment or indictment by a grand jury, and does not give to the accused a petit jury. The want of such clauses, as affecting the validity of the legislation, we have already considered. It is not pretended that the prisoner did not have, in other respects, a fair trial in the Consular Court.

It is further objected to the proceedings in the consular court that the offence with which the petitioner was charged, having been committed on board of a vessel of the United States in Japanese waters, was not triable before the Consular Court; and that the petitioner, being a subject of Great Britain, was not within the jurisdiction of that court. These objections we will now proceed to consider.

The argument presented in support of the first of these positions is briefly this. Congress has provided for the punishment of murder committed upon the high seas, or any arm or bay of the sea within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State; and has provided that the trial of all offences committed upon the high seas, out of the jurisdiction of any particular State, shall be in the district where the offender is found or into which he is first brought. The term "high seas" includes waters on the sea coast without the boundaries of low-water mark; and the waters of the port of Yokohama constitute, within the meaning of the statute, high seas. Therefore it is contended that, although the ship *Bullion* was at the time lying in those waters, the offence for which the appellant was tried and convicted was committed on the high seas and within the jurisdiction of the domestic tribunals of the United States, and is not punishable elsewhere. In support of this position it is assumed that the jurisdiction of the Consular Court is limited to offences committed on land, within the territory of Japan, to the exclusion of offences committed on waters within that territory.

There is, as it seems to us, an obvious answer to this argument. The jurisdiction to try offences committed on the high seas in the district where the offender may be found, or into which he may be first brought, is not exclusive of the jurisdiction of the consular tribunal to try a similar offence when committed in a port of a foreign country in which that tribunal is established, and the offender is not taken to the United States. There is no law of Congress compelling the master of a vessel to carry or transport him to any home port when he can be turned over to a Consular Court having jurisdiction of

similar offences committed in the foreign country. 7 Opinions Attys.-Gen. 722. The provisions conferring jurisdiction in capital cases upon the consuls in Japan, when the offence is committed in that country, are embodied in the Revised Statutes, with the provisions as to the jurisdiction of domestic tribunals over such offences committed on the high seas; and those statutes were re-enacted together, and, as re-enacted, went into operation at the same time. To both effect must be given in proper cases, where they are applicable. We do not adopt the limitation stated by counsel to the jurisdiction of the consular tribunal, that it extends only to offences committed on land. Neither the treaty nor the Revised Statutes to carry them into effect contain any such limitation. The latter speak of offences committed in the country of Japan — meaning within the territorial jurisdiction of that country — which includes its ports and navigable waters as well as its lands.

The position that the petitioner, being a subject of Great Britain, was not within the jurisdiction of the Consular Court, is more plausible, but admits, we think, of a sufficient answer. The national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American ship *Bullion*. By such enlistment he becomes an American seaman — one of an American crew on board of an American vessel — and as such entitled to the protection and benefits of all the laws passed by Congress on behalf of American seamen, and subject to all their obligations and liabilities. Although his relations to the British Government are not so changed that, after the expiration of his enlistment on board of the American ship, that government may not enforce his obligation of allegiance, and he on the other hand may not be entitled to invoke its protection as a British subject, that relation was changed during his service of seaman on board of the American ship under his enlistment. He could then insist upon treatment as an American seaman, and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born. He owes for that time to the country to which the ship on which he is serving belongs, a temporary allegiance, and must be held to all its responsibilities. The question has been treated more as a political one for diplomatic adjustment, than as a legal one to be determined by the judicial tribunals, and has been the subject of correspondence between our government and that of Great Britain.

The position taken by our government is expressed in a communication from the Secretary of State, to the British Government, under date of June 16, 1881. It was the assertion of a principle which the

Secretary insisted "is in entire conformity with the principles of English law as applied to a mercantile service almost identical with our own in its organization and regulation. That principle is that, when a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation in the exercise of an unquestioned authority governs its vessels and seamen. If, therefore," he continued, "the government of the United States has by treaty stipulation with Japan acquired the privilege of administering its own laws upon its own vessels and in relation to its own seamen in Japanese territory, then every American vessel and every seaman of its crew are subject to the jurisdiction which by such treaty has been transferred to the government of the United States."

"If Ross had been a passenger on board of the *Bullion*, or if, residing in Yokohama, he had come on board temporarily and had then committed the murder, the question of jurisdiction would have been very different. But, as it was, he was part of the crew, a duly enrolled seaman under American laws, enjoying the protection of this government to such an extent that he could have been protected from arrest by the British authorities; and his subjection to the laws of the United States cannot be avoided just at the moment that it suits his convenience to allege foreign citizenship. The law which he violated was the law made by the United States for the government of United States vessels; the person murdered was one of his own superior officers whom he had bound himself to respect and obey, and it is difficult to see by what authority the British Government can assume the duty or claim the right to vindicate that law or protect that officer."

"The mercantile service is certainly a national service, although not quite in the sense in which that term would be applied to the national navy. It is an organized service, governed by a special and complex system of law, administered by national officers, such as collectors, harbor masters, shipping masters and consuls, appointed by national authority. This system of law attaches to the vessel and crew when they leave a national port and accompanies them round the globe, regulating their lives, protecting their persons and punishing their offences. The sailor, like the soldier during his enlistment, knows no other allegiance than to the country under whose flag he serves. This law may be suspended while he is in the ports of a foreign nation, but where such foreign nation grants to the country which he serves the power to administer its own laws in such for-

eign territory, then the law under which he enlisted again becomes supreme."

The Secretary concluded his communication with the following expression of the determination of our government:

"So impressed is this government with the importance and propriety of these views, that while it will receive with the most respectful consideration the expression of any different conviction which her Britannic Majesty's government may entertain, it will yet feel bound to instruct its consular and diplomatic officers in the East, that in China and Japan the judicial authority of the consuls of the United States will be considered as extending over all persons duly shipped and enrolled upon the articles of any merchant vessel of the United States, whatever be the nationality of such person. And all offences which would be justiciable by the Consular Courts of the United States, where the persons so offending are native born or naturalized citizens of the United States, employed in the merchant service thereof, are equally justiciable by the same Consular Courts in the case of seamen of foreign nationality."

The determination thus expressed was afterwards carried out by incorporating the doctrine into the permanent regulations of the department for the guide of the consuls of this country. 72d regulation.

The views thus forcibly expressed present in our judgment the true status of the prisoner while an enlisted seaman on the American vessel, and give effect to the purpose of the treaty and the legislation of Congress. The treaty uses the term "Americans" in speaking of those who may be brought within the jurisdiction of the Consular Court for offences committed in Japan. The statute designates them as "citizens of the United States," and yet extends the laws of the United States, so far as they may be necessary to execute the treaty and are suitable to carry the same into effect, not only over all citizens of the United States in Japan, but also over "all others to the extent that the terms of the treaty justify or require."

Reading the treaty and statute together in view of the purpose designed to be accomplished, we are satisfied that it was intended by them to bring within our laws all who are citizens, and also all who, though not strictly citizens, are by their service equally entitled to the care and protection of the government. It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the ap-

plication of this rule. The inquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties.

In *Geofroy* v. *Riggs*, 133 U. S. 258, which was before this court at the last term, it was held that the District of Columbia, as a political community, is one of "the States of the Union," within the meaning of that term as used in the consular convention of 1853 with France; such construction being necessary to give consistency to the provisions of the convention, and not defeat the consideration given by France for her concession of certain rights to citizens of the United States. And in the present case, to carry out the intention of the treaty and statute in question, they will be construed to apply to all parties who are by public law, or the law of the country, entitled to be treated for the time, from their employment and service, as citizens. There are many adjudications to the effect that such character will be ascribed to parties and they be held liable to all its consequences, and entitled to all its benefits, on other grounds than birth or naturalization.

A statute of Henry VIII. enacted that if anybody should rob or take "the goods of the King's subjects within this realm," and be found guilty, the party robbed should have restitution of the goods. Of this statute Sir Matthew Hale said that "though it speaks of the King's subjects, it extends to aliens robbed; for though they are not the King's natural born subjects, they are the King's subjects when in England, by local allegiance." 1 Hale's Pleas of the Crown, p. 542.

In *United States* v. *Holmes*, 5 Wheat. 412, which is in point in the case before us, certain parties were indicted in the Circuit Court of the United States for the District of Massachusetts and convicted of murder on the high seas. It appeared that a vessel, apparently Spanish, was captured by privateers from Buenos Ayres, and a prize crew was put on board, of whom the prisoners were a part. One of them was a citizen of the United States and the others were foreigners. The crime was committed by drowning the person, whose death was charged, by the prisoners driving or throwing him overboard. On motion for a new trial certain questions arose on which the judges were divided in opinion. One of these was, whether it made any difference as to the point of jurisdiction, whether the prisoners or any of them were citizens of the United States, or that the offence was committed, not on board of any vessel, but on the high seas. The court said that the question contained two propositions; one as to the national character of the offender and the person against whom the offence was committed; and second as to the place where it was committed. In respect to the first the court was of the opin-

ion that it made no difference whether the offender was a citizen of the United States or not; adding, "if it (the offence) be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the Untied States by a foreigner, the offender is to be considered, *pro hâc vice*, and in respect to this subject, as belonging to the nation under whose flag he sails."

The views expressed by the Department of State, quoted above, are in harmony with the doctrine uniformly asserted by our government against the claim by England of a right to take its countrymen from the deck of an American merchant vessel and press them into its naval service. It is a part of our history that the assertion of this claim, and its enforcement in many instances, caused a degree of irritation among our people which no conduct of any other country has ever produced. Its enforcement was deemed a great indignity upon this country and a violation of our right of sovereignty, our vessels being considered as parts of our territory. It led to the war of 1812, and although that war closed without obtaining a relinquishment of the claim, its further assertion was not attempted. At last, in a communication by Mr. Webster, then Secretary of State, to Lord Ashburton, the special British minister to this country, on the 8th of August, 1842, the claim was repudiated, and the announcement made that it would no longer be allowed by our government and must be abandoned. The conclusion of Mr. Webster's communication bears upon the question before us. After referring to the claim of Great Britain, and demonstrating the injustice of the position and its violation of national rights, he said: "In the early disputes between the two governments, on this so long-contested topic, the distinguished person to whose hands were first intrusted the seals of this department declared, that 'the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such.' Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration now had of the whole subject at a moment when the passions are laid, and no present interest or emergency exists to bias the judgment, have convinced this government that this is not only the simplest and best, but the only rule which can be adopted and observed consistently with the rights and honor of the United States, and the security of their citizens. That rule announces, therefore, what will hereafter be the principle maintained by their government. In every regularly documented American merchant vessel, the crew who navigate it will find their protection in the flag which is over them." Webster's Works, Vol. VI. p. 325.

This rule, that the vessel being American is evidence that the seamen on board are such, is now an established doctrine of this country;

and in support of it there is with the American people no diversity of opinion and can be no division of action.

We are satisfied that the true rule of construction in the present case was adopted by the Department of State in the correspondence with the English Government, and that the action of the consular tribunal in taking jurisdiction of the prisoner Ross, though an English subject, for the offence committed, was authorized. While he was an enlisted seaman on the American vessel, which floated the American flag, he was, within the meaning of the statute and the treaty, an American, under the protection and subject to the laws of the United States equally with the seaman who was native born. As an American seaman he could have demanded a trial before the Consular Court as a matter of right, and must therefore be held subject to it as a matter of obligation.

It is true that the occasion for consular tribunals in Japan may hereafter be less than at present, as every year that country progresses in civilization and in the assimilation of its system of judicial procedure to that of Christian countries, as well as in the improvement of its penal statutes; but the system of consular tribunals which have a general similarity in their main provisions, is of the highest importance, and their establishment in other than Christian countries, where our people may desire to go in pursuit of commerce, will often be essential for the protection of their persons and property.

We have not considered the objection to the discharge of the prisoner on the ground that he accepted the conditional pardon of the President. If his conviction and sentence were void for want of jurisdiction in the consular tribunal, it may be doubtful whether he was estopped, by his acceptance of the pardon, from assailing their validity; but into that inquiry we need not go, for the Consular Court having had jurisdiction to try and sentence him, there can be no question as to the binding force of the acceptance.

Order affirmed.[1]

[1] By Treaty of Nov. 22, 1894 (Articles 17, 19), the United States consented to the abrogation of consular jurisdiction in Japan, and on July 17, 1899, such Consular Courts ceased to exist.

As regard to the nationality of a merchant vessel and the proof necessary to establish its national character, it was said in *The Brig Juno*, 1901, 36 Ct. Cl.: "The proof is sufficient to show that the brig was duly registered, and the register sufficiently establishes the nationality of the vessel."

As to the papers carried by vessels as evidence of their nationality, see Hall, Int. Law (3d ed.), Appendix II; 4th ed. 756, note 1; Taylor's Int Law, § 552; 3 Wharton's Digest, §§ 408–410. — Ed.

"THE CREOLE."

COMMISSION OF CLAIMS UNDER CONVENTION BETWEEN UNITED STATES AND GREAT BRITAIN, FEBRUARY 8, 1853.

(*Report of Commission*, 241.)

This case was submitted to the umpire under the circumstances named in the preceding case of the *Hermosa*, to which reference is made.

The facts in the case are briefly set forth above, and are also stated at length in the opinion of the umpire, so that further statement of them is unnecessary.

Thomas, agent and counsel for the United States. Hannen, agent and counsel for Great Britain. Bates, umpire:

This case having been submitted to the umpire for his decision, he hereby reports that the claim has grown out of the following circumstances:

The American brig, *Creole*, Captain Ensor, sailed from Hampton Roads, in the State of Virginia, on the 27th of October, 1841, having on board one hundred and thirty-five slaves, bound for New Orleans. On the 7th of November, at nine o'clock in the evening, a portion of the slaves rose against the officers, crew, and passengers, wounding severely the captain, the chief mate, and two of the crew, and murdering one of the passengers; the mutineers, having got complete possession of the vessel, ordered the mate, under threat of instant death should he disobey or deceive them, to steer for Nassau, in the island of New Providence, where the brig arrived on the 9th of November, 1841.

The American consul was apprised of the situation of the vessel, and requested the governor to take measures to prevent the escape of the slaves, and to have the murderers secured. The consul received reply from the governor, stating that under the circumstances he would comply with the request.

The consul went on board the brig, placed the mate in command in place of the disabled master, and found the slaves all quiet.

About noon twenty African soldiers, with an African sergeant and corporal, commanded by a white officer, came on board. The officer was introduced by the consul to the mate as commanding officer of the vessel.

The consul, on returning to the shore, was summoned to attend the governor and council, who were in session, who informed the consul that they had come to the following decision:

"1st. That the courts of law have no jurisdiction over the alleged offences.

"2d. That, as an information had been lodged before the governor, charging that the crime of murder had been committed on board said vessel while on the high seas, it was expedient that the parties, implicated in so grave a charge, should not be allowed to go at large, and that an investigation ought therefore to be made into the charges, and examinations taken on oath; when, if it should appear that the original information was correct, and that a murder had actually been committed, that all the parties implicated in such crime, or other acts of violence, should be detained here until reference could be made to the Secretary of State to ascertain whether the parties should be delivered over to the United States Government; if not, how otherwise to dispose of them.

"3d. That as soon as such examinations should be taken, all persons on board the *Creole*, not implicated in any of the offences alleged to have been committed on board that vessel, must be released from further restraint."

Then two magistrates were sent on board. The American consul went also. The examination was commenced on Tuesday, the 9th, and was continued on Wednesday, the 10th, and then postponed until Friday, on account of the illness of Captain Ensor. On Friday morning it was abruptly and without any explanation, terminated. On the same day, a large number of boats assembled near the *Creole*, filled with colored persons armed with bludgeons. They were under the immediate command of the pilot who took the vessel into the port, who was an officer of the government, and a colored man. A sloop or larger launch was also towed from the shore and anchored near the brig. The sloop was filled with men armed with clubs, and clubs were passed from her to the persons in the boats.

A vast concourse of people were collected on the shore opposite the brig.

During the whole time the officers of the government were on board they encouraged the insubordination of the slaves.

The Americans in port determined to unite and furnish the necessary aid to forward the vessel and negroes to New Orleans. The consul and the officers and crews of two other American vessels had, in fact, united with the officers, men, and passengers of the *Creole* to effect this. They were to conduct her first to Indian quay, Florida, where there was a vessel of war of the United States.

On Friday morning, the consul was informed that attempts would be made to liberate the slaves by force, and from the mate he received information of the threatening state of things. The result was, the

attorney-general and other officers went on board the *Creole*. The slaves identified as on board the vessel concerned in the mutiny, were sent on shore, and the residue of the slaves were called on deck by direction of the attorney-general, who addressed them in the following terms: "My friends," or "my men, you have been detained a short time on board the *Creole* for the purpose of ascertaining what individuals were concerned in the murder. They have been identified, and will be detained. The rest of you are free, and at liberty to go on shore, and wherever you please."

The liberated slaves, assisted by the magistrates, were then taken on board the boats, and when landed were conducted by a vast assemblage to the superintendent of police, by whom their names were registered. They were thus forcibly taken from the custody of the master of the *Creole*, and lost to the claimants.

I need not refer to authorities to show that slavery, however odious and contrary to the principles of justice and humanity, may be established by law in any country; and, having been so established in many countries, it cannot be contrary to the law of nations.

The *Creole* was on a voyage, sanctioned and protected by the laws of the United States, and by the law of nations. Her right to navigate the ocean could not be questioned, and as growing out of that right, the right to seek shelter or enter the ports of a friendly power in case of distress or any unavoidable necessity.

A vessel navigating the ocean carries with her the laws of her own country, so far as relates to the persons and property on board, and to a certain extent retains those rights even in the ports of the foreign nations she may visit. Now, this being the state of the law of nations, what were the duties of the authorities at Nassau in regard to the *Creole?* It is submitted the mutineers could not be tried by the courts of that island, the crime having been committed on the high seas. All that the authorities could lawfully do, was to comply with the request of the American consul, and keep the mutineers in custody until a conveyance could be found for sending them to the United States.

The other slaves, being perfectly quiet, and under the command of the captain and owners, and on board an American ship, the authorities should have seen that they were protected by the law of nations; their rights under which cannot be abrogated or varied, either by the Emancipation act or any other act of the British Parliament. Blackstone, 4th volume, speaking of the law of nations, states: "Whenever any question arises which is properly the object of its jurisdiction, such law is here adopted in its full extent by the common law."

The municipal law of England cannot authorize a magistrate to

violate the law of nations by invading with an armed force the vessel of a friendly nation that has committed no offence, and forcibly dissolving the relations which by the laws of his country the captain is bound to preserve and enforce on board.

These rights, sanctioned by the law of nations — viz.: the right to navigate the ocean, and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers, the laws of her own country — must be respected by all nations; for no independent nation would submit to their violation. Having read all the authorities referred to in the arguments on both sides, I have come to the conclusion that the conduct of the authorities at Nassau was in violation of the established law of nations, and that the claimants are justly entitled to compensation for their losses. I therefore award to the undermentioned parties, their assigns, or legal representatives, the sums set opposite their names, due on the 15th of January, 1855.[1]

[1] See elaborate opinion on the same subject in the brig *Enterprise*, pp. 187–237, and the shorter one in the *Hermosa*, pp. 238–240, Report of the Commission. Compare *In re Moncan*, 1882, 14 Fed. 44, and *In re Ah Kee*, 1884, 22 Fed. 519.

In speaking of the umpire, Professor J. B. Moore says (1 International Arbitration 1898, 399–400): "In more than one conjuncture his position, due not only to his extensive connections in business, but also to his high personal character, enabled him to contribute to the good relations between the country of his birth and that of his adoption. In 1852 he gave the first effective impulse "to the foundation on a broad basis of the Boston Public Library by a gift of fifty thousand dollars, which he afterwards more than doubled by the purchase and donation of books." The reading room in the new Boston Public Library, as was that in the old, is called Bates Hall, in memory of Joshua Bates. . . .

"As umpire, Mr. Bates, if possible, more than fulfilled the expectations formed of him, and materially contributed to the happy results of the commission. On many of the most important and delicate questions before the board it became his duty to give the final decision. Though this circumstance rendered his labors arduous and his responsibility great, he decided all questions that came before him with promptitude, and with a sound, impartial, independent judgment, and although provision was made by the convention for the compensation of the umpire, he declined to receive for his services any remuneration whatever."

In an action to recover insurance effected on the slaves and cargo of the *Creole*, the same doctrine was enforced. The Supreme Court of Louisiana held *inter alia* that where slaves were shipped from one part of the United States to another, and they rose against the officer of the vessel, and took it into a British port, they were still slaves, though in a state of insurrection; that they did not cease to be the property of their owners, though the right of property could not be asserted in a British court, nor enjoyed within the exclusive influence of British law. *McCargo* v. *N. O. Ins. Co.*, 1845. 10 Rob. (La.), 202, 312–332.

Mr. Dana criticises the decision of Mr. Bates in this case. "It may be conceded, as a general statement," he says, "that local authorities ought to give active aid to a master in defending and enforcing, against the inmates of his vessel, the rights with which his own nation has intrusted him, if these rights are of a character generally

Section 11. — Right of Asylum.

(*a*) *In Legations.*

UNITED STATES v. JEFFERS.

United States Circuit Court for District of Washington, 1836.

(4 *Cranch, Circuit Court*, 704.)

Francis S. Key,[1] Attorney of the United States for the District of Columbia, having laid before the court a letter to him from the Secretary of State, wherein it appeared that a constable, Madison Jeffers, had removed from the house of Mr. Bankhead, the British Secretary of Legation, a colored lad employed for hire in his family in order to restore the said lad to his master; it was, on the motion of said attorney of the United States, ordered, that the said Madison Jeffers be removed from the office of constable of the County of Washington, unless he show cause to the contrary on the thirty-first day of May instant, provided, etc. "By order of the court, May 30th, 1836."

The rule having been duly served, the said Madison Jeffers appeared on the 31st of May and, by way of showing cause, filed his affidavit admitting the facts, but alleging his ignorance of the diplomatic privileges, and his belief that he was executing his duty lawfully, in arresting a fugitive slave, and disclaiming all intentional disrespect to Mr. Bankhead.

recognized among all nations, and not prohibited by the law of the place. But it may well admit of doubt, whether the local authorities must give active aid to the master against persons on board his vessel who are doing no more than peacefully and quietly dissolving, or refusing to recognize, a relation which exists only by force of the law of the nation to which the vessel belongs, if the law is peculiar to that nation, and one which the law of the other country regards as against common right and public morals. The local authorities might not interfere to dissolve such relations, where the peace of the port or the public morals are not put in peril; but they might, it would seem, decline to lend force to compel their continuance." See, also, the adverse criticism of Hall (Int. Law. 269).

In the case of the *Fortuna*, 1803, 5 C. Rob. 27, the ship was proceeded against for a violation of the blockade of the Weser. The master of the captured vessel gave as an excuse for entering the blockaded place, the want of provisions, and a strong westerly wind. Sir W. Scott held that "want of provisions" was not such an "imperative and overruling compulsion" as to excuse a breach of blockade. But on the other ground, after further proof, the vessel was restored. See *United States* v. *Dickelman*, 1875, 92 U. S. 320, *infra*. — Ed.

[1] Better known as author of "The Star Spangled Banner," 1814. — Ed.

His counsel, Mr. W. L. Brent, contended that Jeffers, as the agent of the owner of the slave, had a right to take him anywhere; and also that, as a constable, he had a right to take up a runaway, that the diplomatic privilege extends only to foreign ministers and upon certains terms; and not to servants of a secretary of legation.

That the servant had not been registered according to the Act of Congress of 30th of April, 1790, § 26 (Stat. at Large, 112), and therefore Jeffers had a right to arrest him; because the act of Congress for punishing the violation of privilege does not extend to those who may arrest a servant not registered. By not registering his servant, the minister has waived his privilege, *Seacourt* v. *Bowlney*, 1 Wils., 20.

The court stopped Mr. Key in reply. THURSTON, J., said he wished no further time or argument. He was of opinion that Jeffers should be dismissed from office.

MORSELL, J., concurred.

CRANCH, C. J., would have taken time to consider; but said that his present opinion coincided with that of the court.

Whereupon the court passed the following order:

"Madison Jeffers, upon whom a rule was laid on the 30th of May last, to show cause why he should not be removed from the office of constable for the county of Washington, upon the grounds therein stated, appeared and filed his affidavit, and the same was read and heard, and he was further heard by his counsel whereupon

"It is considered by the court, that the said Madison Jeffers was guilty of a violation of the privileges of His Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary, as stated, in his letter to the Secretary of State referred to in the said rule; and the said Madison Jeffers, having shown no sufficient cause to the contrary, it is thereupon considered by the Court, this 7th day of June, 1836, that the said Madison Jeffers be, and he is hereby, removed from his said office of constable for the county aforesaid."[1]

[1] In 1726, the Duke of Ripperda, Spanish Minister of Finance and Foreign Affairs accused of favoring the interests of Holland and England, took refuge in the British legation in Madrid. The Spanish government demanded delivery of his person and papers, on refusal of which the Spanish authorities forced an entrance and arrested the Duke. This proceeding naturally added to the hard feeling already existing between the two countries, and two years later war broke out between them (Martens, Causes Célèbres, I. 178).

Vattel, writing thirty years later, says of the opinion of the Council of Castile, "On ne peut rien dire de plus vrai et de plus judicieux sur cette matière."

Merlin said, "On voit par ces détails, que le droit d'asyle est, à l'égard des hôtels des ambassadeurs, une source perpetuelle de dissensions et de querelles. Le bien des nations demanderait, sans doute, qu'on l'abolît tout-à-fait: et cela paraît d'autant plus raisonable, qu'il y a plusieurs états dans lesquels il n'est point connu."

(*b*) *On Board Ships of War.*

FORBES v. COCHRANE.

KING'S BENCH, 1824.

(2 *Barnwell & Cresswell*, 448.)

The declaration stated that the plaintiff was lawfully possessed of a certain cotton plantation, situate in parts beyond the seas, to wit, in East Florida, of large value, and on which plantation he employed divers persons, his slaves or servants. The first count charged the defendants with enticing the slaves away. The second count stated that the slaves or servants having wrongfully and against the plain-

In 1747, a Swedish merchant of the name of Springer, accused of high treason, took refuge in the hotel of the English Ambassador, Colonel Guideckens, at Stockholm. The ambassador refused to surrender him; the Swedish government surrounded his house with troops, searched everybody who entered it, and caused the carriage of the ambassador, when he left the hotel, to be followed by a guard. Guideckens surrendered Springer under a protest as to the violence done to his ambassadorial privilege. England demanded reparation, and Sweden steadily refused to give it, and the ambassadors from the two courts were mutually withdrawn.

Ripperda's case seems to have settled the law as regards asylum, and it is held as well established that a diplomatic agent has and can have the immunity only for himself and his diplomatic or personal household, and that he cannot use his individual and official right to immunity to receive and protect from arrest citizens of the country to which he is accredited.

In South America it is a general practice to claim and exercise the right and privilege as stated in above note, but the practice is bad, unreasonable, and so obviously a violation of local sovereignty that it cannot claim recognition as a principle of international law. It is tolerated, rather than justified, by the exceptional circumstances in Central and South American republics.

"In the United States," says Mr. J. B. Moore, "where the supremacy of the local law is rigorously maintained, diplomatic asylum has never existed. With this exception, it is believed that examples may be found in every independent American state. In the countries that were formerly Spanish colonies, the practice may be said to have been inherited; and in some of them it has been so far extended to include persons resting under civil and commercial responsibilities. The principal excuse for its continuance has been found in the constantly recurring tumults which fill so many pages in the history of American republics, and which, by reason of their partisan complexion, Mr. Seward once described as representing 'a chronic revolutionary condition.'"

The vexed question of asylums in legations and consulates and in vessels has been treated historically and logically in three articles by Mr. Moore, published in Political Science Quarterly for 1892.

See, also, the more recent article by Mr. Barry Gilbert on The Right of Asylum in the Legations of the United States in Central and South America, 15 Harvard Law Review, 118–140. — ED.

tiff's will quitted and left the plantation and the plaintiff's service, and gone into the power, care, and keeping of the defendants; they, knowing them to be the slaves or servants of the plaintiff, wrongfully received the slaves into their custody, and harbored, detained, and kept them from the plaintiff's service. The last count was for wrongfully harboring, detaining, and keeping the slaves or servants of the plaintiff after notice given to the defendants that the slaves were the plaintiff's property, and request made to the defendants by the plaintiff to deliver them up to him: plea, not guilty. At the trial before Abbott, C. J., at the London sittings after Trinity term, 1822, a verdict was found for the plaintiff, damages £3,800, subject to the opinion of the court on the following case.

The plaintiff was a British merchant in the Spanish provinces of East and West Florida, where he had carried on trade for a great many years, and was principally resident at Pensacola in West Florida. East and West Florida were part of the dominions of the king of Spain, and Spain was in amity with Great Britain. The plaintiff, before and at the time of the alleged grievances, was the proprietor and in the possession of a cotton plantation, called San Pablo, lying contiguous to the river St. John's, in the province of East Florida, and of about one hundred negro slaves whom he had purchased, and who were employed by him upon his plantation. The river St. John's is about thirty or forty miles from the confines of Georgia, one of the United States of America, which is separated from East Florida by the river St. Mary, and Cumberland Island is at the mouth of the river St. Mary on the side next Georgia, and forms part of that State. During the late war between Great Britain and America, in the month of February, 1815, the defendant, Vice-Admiral Sir Alexander Inglis Cochrane, was commander-in-chief of His Majesty's ships and vessels on the North American station. The other defendant, Rear-Admiral Sir George Cockburn, was the second in command upon the said station, and his flag-ship was the *Albion*. The British forces had taken possession of Cumberland Island, and at that time occupied and garrisoned the same. The *Albion*, *Terror Bomb*, and others of His Majesty's ships of war, formed a squadron under Sir George Cockburn's immediate command off that island, where the headquarters of the expedition were.[1]

In the night of the 23d February, 1815, a number of the plaintiff's slaves deserted from his said plantation, and on the following day thirty-eight of them were found on board the *Terror Bomb*, part of the squadron at Cumberland Island, and entered on her muster-books as refugees from St. John's. On the 26th of the same month of Feb-

[1] The statement is condensed by omitting unnecessary facts. — ED.

ruary, Sir George Cockburn received from the plaintiff a memorial. The plaintiff prayed "that the defendant, Sir G. Cockburn, would order the said thirty-eight slaves to be forthwith delivered to him, their lawful proprietor." Sir G. Cockburn told him he might see his slaves, and use any arguments and persuasions he chose to induce them to return. The plaintiff accordingly endeavored to persuade them to go back to his plantation, and no restraint was put upon them, but they refused to go. The plaintiff then urged his claim very strongly to Sir G. Cockburn, and said he must get redress if he did not succeed in prevailing upon Sir G. Cockburn to order them back again, which Sir G. Cockburn said he could not do, because they were free agents and might do as they pleased, and that he could not force them back.

Holroyd, J.[1] I am also of opinion that the plaintiff is not entitled to maintain the present action. The declaration alleges that the plaintiff was the proprietor, and in the possession of a cotton plantation lying contiguous to the river St. John's, in East Florida, on which land he employed divers persons, his slaves or servants. The plaintiff therefore claims a general property in them as his slaves or servants, and he claims this property, as founded, not upon any municipal law of the country where he resides, but upon a general right. This action is therefore founded upon an injury done to that general right. Now it appears, from the facts of the case, that the plaintiff had no right in these persons, except in their character of slaves, for they were not serving him under any contract; and, according to the principles of the English law, such a right cannot be considered as warranted by the general law of nature. I do not mean to say that particular circumstances may not introduce a legal relation to that extent; but assuming that there may be such a relation, it can only have a local existence, where it is tolerated by the particular law of the place, to which law all persons there resident are bound to submit. Now if the plaintiff cannot maintain this action under the general law of nature, independently of any positive institution, then his right of action can be founded only upon some right which he has acquired by the law of the country where he is domiciled. If he, being a British subject, could show that the defendant, also a British subject, had entered the country where he, the plaintiff, was domiciled, and had done any act amounting to a violation of that right to the possession of slaves which was allowed by the laws of that country, I am by no means prepared to say that an action might not be maintained against him. The laws of England will protect the rights

[1] The arguments of counsel, the opinion of Bayley, J., and part of the opinion of Best, J., are omitted. — Ed.

of British subjects, and give a remedy for a grievance committed by one British subject upon another, in whatever country that may be done. That, however, is a very different case from the present. Here, the plaintiff, a British subject, was resident in a Spanish colony, and perhaps it may be inferred, from what is stated in the special case, that, by the law of that colony, slavery was tolerated. I am of opinion, that, according to the principles of the English law, the right to slaves, even in a country where such rights are recognized by law, must be considered as founded not upon the law of nature, but upon the particular law of that country. And, supposing that the law of England would give a remedy for the violation of such a right by one British subject to another (both being resident in and bound to obey the laws of that country) still the right to these slaves being founded upon the law of Spain, as applicable to the Floridas, must be co-extensive with the territories of that State. I do not mean to say, that if the plaintiff having the right to possess these persons as his slaves there, had taken them into another place, where, by law, slavery also prevailed, his right would not have continued in such a place, the laws of both countries allowing a property in slaves. The law of slavery is, however, a law *in invitum;* and when a party gets out of the territory where it prevails, and out of the power of his master, and gets under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the particular place only, does not continue, and there is no right of action against a party who merely receives the slave in that country, without doing any wrongful act. This has been decided to be the law with respect to a person who has been a slave in any of our West India colonies and comes to this country. The moment he puts his foot on the shores of this country his slavery is at an end. Put the case of an uninhabited island discovered and colonized by the subjects of this country the inhabitants would be protected and governed by the laws of this country. In the case of a conquered country, indeed, the old laws would prevail, until altered by the King in council; but in the case of the newly discovered country, freedom would be as much the inheritance of the inhabitants and their children as if they were treading on the soil of England. Now, suppose a person who had been a slave in one of our own West India settlements, escaped to such a country, he would thereby become as much a freeman as if he had come into England. He ceases to be a slave in England only because there is no law which sanctions his detention in slavery; for the same reason he would cease to be a slave the moment he landed in the supposed newly discovered island. In this case,

indeed, the fugitives did not escape to any island belonging to England, but they went on board an English ship (which for this purpose may be considered a floating island), and in that ship they became subject to the English laws alone. They then stood in the same situation in this respect as if they had come to an island colonized by the English. It was not a wrongful act in the defendants to receive them, quite the contrary. The moment they got on board the English ship there was an end of any right which the plaintiff had by the Spanish laws acquired over them as slaves. They had got beyond the control of their master, and beyond the territory where the law recognizing them as slaves prevailed. They were under the protection of another power. The defendants were not subject to the Spanish law, for they had never entered the Spanish territories, either as friends or enemies. The plaintiff was permitted to see the men, and to endeavor to persuade them to return; but in that he failed. He never applied to be permitted to use force; and it does not appear that he had the means of doing so. I think that Sir G. Cockburn was not bound to do more than he did; whether he was bound to do so much it is unnecessary for me to say. It was not a wrongful act in him, a British officer, to abstain from using force to compel the men to return to slavery. It does not appear that he prevented force being used. I do not say that he might not have refused, but in fact there was no refusal. I have given my opinion upon this question, supposing that there would be a right of action against these defendants, if a wrong had actually been done by them, but I am by no means clear that, even under such circumstances, any action would have been maintainable against them by reason of their particular situation as officers acting in discharge of a public duty, in a place *flagrante bello*. I doubt whether the application ought not to have been made in such a case to the governing powers of this country for redress. The cases from the admiralty courts are distinguishable from the present, upon the grounds already stated by my Brother Bayley. In *Madrazo* v. *Willes*, 3 B. & Ald. 353, the plaintiff was a Spanish subject, and by the law of Spain slavery and the trade in slaves being tolerated, he had a right, by the laws of his own country, to exercise that trade. The taking away the slaves was an active wrong done in aggression upon rights given by the Spanish law. That is very different from requiring, as in this case, an act to be done against the slaves, who had voluntarily left their master. When they got out of the territory where they became slaves to the plaintiff and out of his power and control, they were, by the general law of nature, made free, unless they were slaves by the particular law of the place where the defendant received them. They were not slaves by the law which

prevailed on board the British ship of war. I am, therefore, of opinion that the defendants are entitled to the judgment of the court.

Best, J. The question is, were these persons slaves at the time when Sir G. Cockburn refused to do the act which he was desired to do? I am decidedly of opinion that they were then no longer slaves. The moment they put their feet on board of a British man-of-war, not lying within the waters of East Florida (where, undoubtedly, the laws of that country would prevail), those persons who before had been slaves were free. The defendants were not guilty of any act prejudicial to the rights which the plaintiff alleges to have been infringed. Those rights were at an end before the defendants were called upon to act. Slavery is a local law, and, therefore, if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognized by the local law, they have broken their chains, they have escaped from their prison, and are free. These men, when on board an English ship, had all the rights belonging to Englishmen, and were subject to all their liabilities. If they had committed any offence they must have been tried according to English laws. If any injury had been done to them they would have had a remedy by applying to the laws of this country for redress. I think that Sir G. Cockburn did all that he lawfully could do to assist the plaintiff; he permitted him to endeavor to persuade the slaves to return; but he refused to apply force. I think that he might have gone further, and have said that force should not be used by others; for if any force had been used by the master or any person in his assistance, can it be doubted that the slaves might have brought an action of trespass against the persons using that force? Nay, if the slave, acting upon his newly recovered right of freedom, had determined to vindicate that right, originally the gift of nature, and had resisted the force, and his death had ensued in the course of such resistance, can there be any doubt that every one who had contributed to that death would, according to our laws, be guilty of murder? That is substantially decided by Sommersett's case, from which, it is clear, that such would have been the consequence had these slaves been in England; and so far as this question is concerned, there is no difference between an English ship and the soil of England; for are not those on board an English ship as much protected and governed by the English laws as if they stood upon English land? Judgment for the defendants.[1]

[1] The case usually cited on this subject is *The Schooner Exchange* v. *McFaddon*, (*supra*), which has been repeatedly affirmed and followed by the Supreme Court. The *Santissima Trinidad*, 1822, 7 Wheat. 352, *infra*, places the exemption that public

(c) *On Board Merchant Ships.*

UNITED STATES v. DIEKELMAN.

SUPREME COURT OF THE UNITED STATES, 1875.

(92 *United States*, 520.)

Mr. Chief Justice WAITE delivered the opinion of the court.

This suit was brought in the Court of Claims under the authority of a joint resolution of both houses of Congress, passed May 4, 1870, as follows: —

ships do undoubtedly enjoy upon the ground of comity, which explanation is more in accordance with the facts and the inherent reason of the thing than the fiction of extraterritoriality. In the case of John Brown, 1820, Sir William Scott (Lord Stowell), wrote an elaborate opinion for the British foreign office, in which he vigorously maintained that the right of asylum, as regards political refugees, does not properly belong to ships of war. 1 Halleck, 228.

On the other hand, a directly opposite view was expressed by Lord Palmerston, in 1849. Mr. Addington, writing to the Secretary of the Admiralty, August 4th, said:—

"Viscount Palmerston directs me to request that you will acquaint the Board of Admiralty that his Lordship is of the opinion that it would not be right to receive and harbor on board a British ship of war any person flying from justice on a criminal charge, or who was escaping from the sentence of a court of law. But a British man-of-war has always and everywhere been considered a safe place of refuge for persons of whatever country or party who had sought shelter under the British flag from persecution on account of their political conduct or opinions; and this protection has been equally offered, whether the refugee was escaping from the arbitrary acts of a monarchical government, or from the lawless violence of a revolutionary committee. * * *

"Although the commander of a ship of war should not seek out or invite political refugees, yet he ought not to turn away or give up any who may reach his ship and have obtained admittance on board. Such officer must of course take care that such refugees shall not carry on from on board his ship any political correspondence with their partisans on shore, and he ought to avail himself of the earliest opportunity to send them to some place of safety elsewhere." Rep. of Royal Comm. on Fug. Slaves, p. 155.

For a full discussion of the question of the extraterritoriality of ships of war, see the separate reports of Lord Chief Justice Cockburn, and Mr. Rothery, in the Report of the Royal Commission on Fugitive Slaves, 1876. Mr. Rothery takes strong ground against the right of asylum on such ships.

Sir James Fitzjames Stephen, another member of the commission, takes similar ground. Stephen's History of the Criminal Law, II., 43-58.

As to American practice, Attorney-General Bradford held, in 1794, that a "writ of *habeas corpus* may be awarded to bring up an American subject unlawfully detained on board a foreign ship of war, the commander being amenable to the usual jurisdiction of the state where he happens to be, and not entitled to claim the extraterritoriality which is annexed to a foreign minister and his domicil." Wharton's Digest, I., 138.

But in 1855, Attorney-General Cushing — a high authority — held that a "prisoner

"That the claim of E. Diekelman, a subject of the King of Prussia, for damages for an alleged detention of the ship *Essex* by the military authorities of the United States at New Orleans, in the month of September, 1862, be and is hereby referred to the Court of Claims for its decision in accordance with law, and to award such damages as may be just in the premises, if he may be found to be entitled to any damages."

Before this resolution was passed, the matter of the claim had been the subject of diplomatic correspondence between the governments of the United States and Prussia.

The following article, originally adopted in the treaty of peace between the United States and Prussia, concluded July 11, 1799 (8 Stat. 168), and revived by the treaty concluded May 1, 1828 (8 Stat. 384), was in force when the acts complained of occurred, to wit: —

"Art. XIII. And in the same case, if one of the contracting parties, being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation, and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding; paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, nor further detained, but shall be allowed to proceed on her voyage."

When the *Essex* visited New Orleans, the United States were en-

of war on board a foreign ship of war, or of her prize, cannot be released by *habeas corpus* issuing from courts of the United States or of a particular State." And again, in 1856, "ships of war enjoy the full rights of extraterritoriality in foreign ports and territorial waters." (Wharton's Digest, I., 138.) It would seem to follow, therefore, that right of asylum could be granted on American ships of war. In South American ports it has frequently been done.

In 1 Halleck, 216, note 2, the various instances are enumerated in which a foreign ship of war is subject to jurisdiction of the port. — Ed.

gaged in the war of the rebellion. The port of that city was, at the very commencement of the war, placed under blockade, and closed against trade and commercial intercourse; but, on the 12th of May, 1862, the President, having become satisfied that the blockade might "be safely relaxed with advantage to the interests of commerce," issued his proclamation, to the effect that from and after June 1 "commercial intercourse, * * * except as to persons, things, and information contraband of war," might "be carried on subject to the laws of the United States, and to the limitations, and in pursuance of the regulations * * * prescribed by the Secretary of the Treasury," and appended to the proclamation. These regulations so far as they are applicable to the present case, are as follows: —

"1. To vessels clearing from foreign ports and destined to * * * New Orleans, * * * licenses will be granted by consuls of the United States upon satisfactory evidence that the vessels so licensed will convey no persons, property, or information contraband of war either to or from the said ports; which licenses shall be exhibited to the collector of the port to which said vessels may be respectively bound, immediately on arrival, and, if required, to any officer in charge of the blockade; and on leaving either of said ports every vessel will be required to have a clearance from the collector of the customs according to law, showing no violation of the conditions of the license." 12 Stat. 1264.

The *Essex* sailed from Liverpool for New Orleans June 19, 1862, and arrived August 24. New Orleans was then in possession of the military forces of the United States, with General Butler in command. The city was practically in a state of siege by land, but open by sea, and was under martial law.

The commanding general was expressly enjoined by the government of the United States to take measures that no supplies went out of the port which could afford aid to the rebellion; and, pursuant to this injunction, he issued orders in respect to the exportation of money, goods, or property, on account of any person known to be friendly to the Confederacy, and directed the custom-house officers to inform him whenever an attempt was made to send anything out which might be the subject of investigation in that behalf.

In the early part of September, 1862, General Butler, being still in command, was informed that a large quantity of clothing had been bought in Belgium on account of the Confederate government, and was lying at Matamoras awaiting delivery, because that government had failed to get the means they expected from New Orleans to pay for it; and that another shipment, amounting to a half million more, was delayed in Belgium from coming forward because of the non-payment

of the first shipment. He was also informed that it was expected the first payment would go forward through the agency of some foreign consuls; and this information afterwards proved to be correct.

He was also informed early in September by the custom-house officers that large quantities of silver-plate and bullion were being shipped on the *Essex*, then loading for a foreign port, by persons, one of whom had declared himself an enemy of the United States, and none of whom would enroll themselves as friends; and he thereupon gave directions that the specified articles should be detained, and their exportation not allowed until further orders.

On the 15th September, the loading of the vessel having been completed, the master applied to the collector of the port for his clearance, which was refused in consequence of the orders of General Butler, but without any reasons being assigned by the collector. The next day, he was informed, however, that his ship would not be cleared unless certain specified articles which she had on board were taken out and landed. Much correspondence ensued between General Butler and the Prussian consul at New Orleans in reference to the clearance, in which it was distinctly stated by General Butler that the clearance would not be granted until the specified goods were landed, and that it would be granted as soon as this should be done. Almost daily interviews took place between the master of the vessel and the collector, in which the same statements were made by the collector. The master refused to land the cargo, except upon the return of his bills of lading. Some of these bills were returned, and the property surrendered to the shipper. In another case, the shipper gave an order upon the master for his goods, and they were taken away by force. At a very early stage in the proceeding, the master and the Prussian consul were informed that the objection to the shipment of the articles complained of was that they were contraband.

A part only of the goods having been taken out of the vessel, a clearance was granted her on the 6th of October, and she was permitted to leave the port and commence her voyage.

Upon this state of facts, the Court of Claims gave judgment for Diekelman, from which the United States took an appeal.

One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must

assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself.

In this case, Diekelman, claiming to have been injured by the alleged wrongful conduct of the military forces of the United States, made his claim known to his government. It was taken into consideration, and became the subject of diplomatic correspondence between the two nations. Subsequently, Congress, by joint resolution, referred the matter to the Court of Claims "for its decision according to law." The courts of the United States were thus opened to Diekelman for this proceeding. In this way the United States have submitted to the Court of Claims, and through that court upon appeal to us, the determination of the question of their legal liability under all the circumstances of this case for the payment of damages to a citizen of Prussia upon a claim originally presented by his sovereign in his behalf. This requires us, as we think, to consider the rights of the claimant under the treaty between the two governments, as well as under the general law of nations. For all the purposes of its decision, the case is to be treated as one in which the government of Prussia is seeking to enforce the rights of one of its citizens against the United States in a suit at law, which the two governments have agreed might be instituted for that purpose. We shall proceed upon that hypothesis.

1. As to the general law of nations.

The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain; and this as well in war as in peace, unless it is otherwise provided by treaty. *The Exchange* v. *McFaddon*, 7 Cranch, 316. When the *Essex* sailed from Liverpool, the United States were engaged in war. The proclamation under which she was permitted to visit New Orleans made it a condition of her entry that she should not take out goods contraband of war, and that she should not leave until cleared by the collector of customs according to law. Previous to June 1 she was excluded altogether from the port by the blockade. At that date the blockade was not removed, but relaxed only in the interests of commerce. The war still remained paramount, and commercial intercourse subordinate

only. When the *Essex* availed herself of the proclamation and entered the port, she assented to the conditions imposed, and cannot complain if she was detained on account of the necessity of enforcing her obligations thus assumed.

The law by which the city and port were governed was martial law. This ought to have been expected by Diekelman when he despatched his vessel from Liverpool. The place had been wrested from the possession of the enemy only a few days before the issue of the proclamation, after a long and desperate struggle. It was, in fact, a garrisoned city, held as an outpost of the Union army, and closely besieged by land. So long as it remained in the possession of the insurgents, it was to them an important blockade-running point, and after its capture the inhabitants were largely in sympathy with the rebellion. The situation was, therefore, one requiring the most active vigilance on the part of the general in command. He was especially required to see that the relaxation of the blockade was not taken advantage of by the hostile inhabitants to promote the interests of the enemy. All this was matter of public notoriety; and Diekelman ought to have known, if he did not in fact know, that although the United States had to some extent opened the port in the interests of commerce, they kept it closed to the extent that was necessary for the vigorous prosecution of the war. When he entered the port, therefore, with his vessel, under the special license of the proclamation, he became entitled to all the rights and privileges that would have been accorded to a loyal citizen of the United States under the same circumstances, but no more. Such restrictions as were placed upon citizens, operated equally upon him. Citizens were governed by martial law. It was his duty to submit to the same authority.

Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed. New Orleans was at this time the theatre of the most active and important military operations. The civil authority was overthrown. General Butler, in command, was the military ruler. His will was law, and necessarily so. His first great duty was to maintain on land the blockade which had theretofore been kept up by sea. The partial opening of the port toward the sea made it all the more important that he should bind close the military lines on the shore which he held.

To this law and this government the *Essex* subjected herself when she came into port. She went there for gain, and voluntarily assumed all the chances of the war into whose presence she came. By

availing herself of the privileges granted by the proclamation, she, in effect, covenanted not to take out of the port "persons, things, or information contraband of war." What is contraband depends upon circumstances. Money and bullion do not necessarily partake of that character; but, when destined for hostile use or to procure hostile supplies, they do. Whether they are so or not, under the circumstances of a particular case, must be determined by some one when a necessity for action occurs. At New Orleans, when this transaction took place, this duty fell upon the general in command. Military commanders must act to a great extent upon appearances. As a rule, they have but little time to take and consider testimony before deciding. Vigilance is the law of their duty. The success of their operations depends to a great extent upon their watchfulness.

General Butler found on board this vessel articles which he had reasonable cause to believe, and did believe, were contraband, because intended for use to promote the rebellion. It was his duty, therefore, under his express instructions, to see that the vessel was not cleared with these articles on board; and he gave orders accordingly. It matters not now whether the property suspected was in fact contraband or not. It is sufficient for us that he had reason to believe, and in fact did believe, it to be contraband. No attempt has been made to show that he was not acting in good faith. On the contrary, it is apparent, from the finding of the court below, that the existing facts brought to his knowledge were such as to require his prompt and vigorous action in the presence of the imminent danger with which he was surrounded. Certainly enough is shown to make it necessary for this plaintiff to prove the innocent character of the property before he can call upon the United States to respond to him in damages for the conduct of their military commander, upon whose vigilance they relied for safety.

Believing, then, as General Butler did, that the property was contraband, it was his duty to order it out of the ship, and to withhold her clearance until his order was complied with. He was under no obligation to return the bills of lading. The vessel was bound not to take out any contraband cargo. She took all the risks of this obligation when she assumed it, and should have protected herself in her contracts with shippers against the contingency of being required to unload after the goods were on board. If she failed in this, the consequences are upon her, and not the United States. She was operating in the face of war, the chances of which might involve her and her cargo in new complications. She voluntarily assumed the risks of her hazardous enterprise, and must sustain the losses that follow.

Neither does it affect the case adversely to the United States that

the property had gone on board without objection from the custom-house officers or the military authorities. It is not shown that its character was known to General Butler or the officers of the custom-house before it was loaded. The engagement of the vessel was not to leave until she had been cleared according to law, and that her clearance might be withheld until with reasonable diligence it could be ascertained that she had no contraband property on board. This is the legitimate effect of the provisions of the treasury regulations, entitling her to a license "upon satisfactory evidence" that she would "convey no persons, property, or information contraband of war, either to or from" the port; and requiring her not to leave until she had "a clearance from the collector of customs, according to law, showing no violation of the license." Her entry into the port was granted as a favor, not as a right, except upon the condition of assent to the terms imposed. If the collector of customs was to certify that the license she held had not been violated, it was his duty to inquire as to the facts before he made the certificate. Every opportunity for the prosecution of this inquiry must be given. Under the circumstances, the closest scrutiny was necessary. If, upon the examination preliminary to the clearance, prohibited articles were found on board, there could be no certificate such as was required, until their removal. It would then be for the vessel to determine whether she would remove the goods and take the clearance, or hold the goods and wait for some relaxation of the rules which detained her in port as long as she had them on board. General Butler only insisted upon her remaining until she removed the property. She elected to remain. There was no time when her clearance would not have been granted if the suspected articles were unloaded.

We are clearly of the opinion that there is no liability to this plaintiff resting upon the United States under the general law of nations.

2. As to the treaty.

The vessel was in port when the detention occurred. She had not broken ground, and had not commenced her voyage. She came into the waters of the United States while an impending war was flagrant, under an agreement not to depart with contraband goods on board. The question is not whether she could have been stopped and detained after her voyage had been actually commenced, without compensation for the loss, but whether she could be kept from entering upon the voyage and detained by the United States within their own waters, held by force against a powerful rebellion, until she had complied with regulations adopted as a means of safety, and to the enforcement of which she had assented, in order to get there. In our opinion, no

provision of the treaties in force between the two governments interferes with the right of the United States, under the general law of nations, to withhold a custom-house clearance as a means of enforcing port regulations.

Art. XIII. of the treaty of 1828 contemplates the establishment of blockades, and makes special provision for the government of the respective parties in case they exist. The vessels of one nation are bound to respect the blockades of the other. Clearly the United States had the right to exclude Prussian vessels, in common with those of all other nations, from their ports altogether, by establishing and maintaining a blockade while subduing a domestic insurrection. The right to exclude altogether necessarily carries with it the right of admitting through an existing blockade upon conditions, and of enforcing in an appropriate manner the performance of the conditions after admission has been obtained. It will not be contended that a condition which prohibits the taking out of contraband goods is unreasonable, or that its performance may not be enforced by refusing a clearance until it has been complied with. Neither, in the absence of treaty stipulations to the contrary, can it be considered unreasonable to require goods to be unloaded, if their contraband character is discovered after they have gone on board. In the existing treaties between the two governments there is no such stipulation to the contrary. In the treaty of 1799, Art. VI. is as follows: "That the vessels of either party, loading within the ports or jurisdiction of the other, may not be uselessly harassed or detained, it is agreed that all examinations of goods required by the laws shall be made before they are laden on board the vessel, and that there shall be no examination after." While other articles in the treaty of 1799 were revived and kept in force by that of 1828, this was not. The conclusion is irresistible, that the high contracting parties were unwilling to continue bound by such a stipulation, and, therefore, omitted it from their new arrangement. It would seem to follow, that, under the existing treaty, the power of search and detention for improper practices continued, in time of peace even, until the clearance had been actually perfected and the vessel had entered on her voyage. If this be the rule in peace, how much more important is it in war for the prevention of the use of friendly vessels to aid the enemy.

Art. XIII. of the treaty of 1799, revived by that of 1828, evidently has reference to captures and detentions after a voyage has commenced, and not to detentions in port, to enforce port regulations. The vessel must be "stopped" in her voyage, not detained in port alone. There must be "captors;" and the vessel must be in a condition to be "carried into port" or detained from "proceeding" after

she has been "stopped," before this article can become operative. Under its provisions the vessel "stopped" might "deliver out the goods supposed to be contraband of war," and avoid further "detention." In this case there was no detention upon a voyage, but a refusal to grant a clearance from the port that the voyage might be commenced. The vessel was required to "deliver out the goods supposed to be contraband" before she could move out of the port. Her detention was not under the authority of the treaty, but in consequence of her resistance of the orders of the properly constituted port authorities, whom she was bound to obey. She preferred detention in port to a clearance on the conditions imposed. Clearly her case is not within the treaty. The United States, in detaining, used the right they had under the law of nations and their contract with the vessel, not one which, to use the language of the majority of the Court of Claims, they held under the treaty "by purchase" at a stipulated price.

As we view the case, the claimant is not "entitled to any damages" as against the United States, either under the treaty with Prussia or by the general law of nations.

The judgment of the Court of Claims is, therefore, reversed, and the cause remanded with directions to dismiss the petition.[1]

[1] See, also, the *Kestor*, 1901, 110 Fed. 432.

In *Sotelo's Case*, 1840, 1 Calvo, 569, M. Sotelo, an ex-Spanish Minister of State, was taken off the French merchant vessel *L'Océan* on reaching Alicante, a Spanish port.

To the same effect was the opinion of Lord Aberdeen, as appears from the following:

"I am directed by Lord Aberdeen to acquaint you, for the information of the Lords Commissioners of the Admiralty, that there is no stipulation in the existing treaties between this country and Spain which can be deemed sufficient to debar the Spanish government from exercising the right which, in his lordship's opinion, appertains to that government of claiming its own subjects when they may be found in a Spanish port as passengers on board vessels hired to convey the mails between this country and the Peninsula." Viscount Canning to the Secretary of the Admiralty, March 20, 1844; Rep. of Royal Comm. on fugitive slaves, 154.

The better American precedents are in accord:

"SIR,—I have to acknowledge the receipt of your No. 316, of the 10th ultimo, in which you inclose copies of the correspondence between the legation at Guatemala and Mr. Leavitt, the United States consul at Managua, respecting the case of José Dolores Gomez, and request more definite instructions for such cases.

"It appears that Mr. Gomez, who is said to be a political fugitive from Nicaragua, voluntarily took passage at San José de Guatemala for Punta Arenas, Costa Rica, on board the Pacific Mail steamship Honduras with the knowledge that the vessel would enter *en route* the port of San Juan del Sur, Nicaragua.

"The government of Nicaragua upon learning of this fact ordered the commandant of the port of San Juan del Sur to arrest Gomez upon the arrival of the Honduras at that port.

Section 12. — Extradition — Interstate Rendition.

UNITED STATES v. RAUSCHER.

Supreme Court of the United States, 1886.

(119 *United States*, 407.)

Mr. Justice Miller delivered the opinion of the court.

"This case comes before us on a certificate of division of opinion between the judges holding the Circuit Court of the United States

"The minister for foreign affairs of Nicaragua informed Mr. Leavitt, United States consul at Managua, of the action of the government by a telegram, as follows:

"'Government has ordered the commander of port San Juan del Sur to arrest José Dolores Gomez, a fugitive prisoner, who is on board of the steamer Honduras, now *en route* to that port. I suppose the captain will not interfere with the action of the commander, but to avoid whatever difficulties likely to arise I suggest you to send a telegraphic message to the captain of the Honduras, at San Juan del Sur, stating that the order has been issued by the government and recommending him to support the commander, as there is no ground on the part of the captain to hinder the execution of the government order.'

"It appears that, before Mr. Leavitt had an opportunity to act upon this request, you telegraphed him as follows:

"'Reported here arrest of a transit passenger bound to Panama on board steamer Honduras at San Juan del Sur. Say respectfully to Nicaraguan minister of foreign affairs that our Government never has consented and never will consent to the arrest and removal from an American vessel in a foreign port, of any passenger in transit, much less if offense is political.'

"It appears that Mr. Leavitt declined to comply with the request of the minister of foreign affairs, and followed your instructions by submitting a copy in writing to the minister.

"From the brief outline given by the consul of the subsequent proceedings, it appears that the government authorities at San Juan del Sur, upon the arrival of the Honduras at that port, requested the captain to deliver up Mr. Gomez. This he declined to do and set sail without proper clearance papers.

"The consul reports that for these offenses the captain has been tried by the Nicaraguan government and found guilty, and although he has not been able to learn the nature of the sentence, he is convinced, from the present attitude of the government, that the sentence will be executed in case of the return of the captain or the vessel within the jurisdiction of the government of Nicaragua.

"As the nature and character of the proceedings against the captain of the Honduras are not known to this department, a full and detailed report should be made as early as practicable. It is clear that Mr. Gomez voluntarily entered the jurisdiction of a country whose laws he had violated. . . .

"It may be safely affirmed that when a merchant vessel of one country visits the

for the Southern District of New York arising after verdict of guilty, and before judgment, on a motion in arrest of judgment.

"The prisoner, William Rauscher, was indicted by a grand jury, for that on the 9th day of October, 1884, on the high seas, out of the jurisdiction of any particular state of the United States, and within the admiralty and maritime jurisdiction thereof, he, the said William Rauscher, being then and there second mate of the ship J. F. Chapman, unlawfully made an assault upon Janssen, one of the crew of the vessel of which he was an officer, and unlawfully inflicted upon said Janssen cruel and unusual punishment. This indictment was found under § 5347 of the Revised Statutes of the United States. * * *

"The prisoner having been extradited upon a charge of murder on the high seas of one Janssen, under § 5339 Rev. Stat., had the Circuit Court of the Southern District of New York jurisdiction to put him to trial upon an indictment under § 5347 Rev. Stat., charging him with cruel and unusual punishment of the same man, he being one of the crew of an American vessel of which the defendant was an officer, and

ports of another for the purposes of trade, it owes temporary allegiance and is amenable to the jurisdiction of that country, and is subject to the laws which govern the port it visits so long as it remains, unless it is otherwise provided by treaty.

"Any exemption or immunity from local jurisdiction must be derived from the consent of that country. No such exemption is made in the treaty of commerce and navigation concluded between this country and Nicaragua on the 21st day of June, 1867." (Bayard, Sec. of St., to Hall, March 12, 1884, in the case of Gomez, U. S. Foreign Relations, 1885, p. 82.)

In the similar case of Barrundia, 1890, the government of the United States set up a different rule. Barrundia was a political refugee from Guatemala who took passage at a Mexican port, on the Pacific Mail Steamship *Acapulco* (American) for Salvador. The steamer was to call on the way at several ports of Guatemala; and on learning of the movements of Barrundia, the government of Guatemala proposed to arrest him. That it could legally do so was the opinion of the American Minister, Mizner, and the American Consul-General Hosmer, and they so advised the captain of the *Acapulco*, and the authorities of Guatemala. In the attempt to arrest Barrundia on board the steamship, he resisted and was killed.

For his part in the affair, Mr. Mizner was severely censured, and recalled from his post. Commander Reiter of the U. S. ship of war *Ranger*, who was present in the port at the time, was also sent into disgrace for not interfering to prevent the arrest.

In his dispatch to Mr. Mizner of Nov. 18, 1890, Mr. Blaine reviews the facts and the law of the case; much of his argument has no bearing on the case, and many of his citations go to disprove his own view of it. It is hardly too much to say that there is no foundation in international law for the position of the United States in this affair. The only possible excuse for it is the assertion that the Spanish-American states do not possess all the rights of sovereign states, and that there should be an exceptional rule adopted in their case, in regard to asylum on merchant ships, as there is in the case of legations.

In addition to the authorities cited in note to *U. S.* v. *Jeffers*, *ante*, see 1 Wharton's Digest, § 104. — Ed.

such punishment consisting of the identical acts proved in the extradition proceedings?

"The treaty with Great Britain, under which the defendant was surrendered by that government to ours upon a charge of murder, is that of August 9, 1842. * * * The tenth article of the treaty is as follows: 'It is agreed that the United States and her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive.'

"Not only has the general subject of the extradition of persons, charged with crime in one country, who have fled to and sought refuge in another, been matter of much consideration of late years by the executive departments and statesmen of the governments of the civilized portion of the world, by various publicists and writers on international law, and by specialists on that subject, as well as by the courts and judicial tribunals of different countries, but the precise questions arising under this treaty, as presented by the certificate of the judges in this case, have recently been very much discussed in this country, and in Great Britain.

"It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined

obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

"Whether in the United States, in the absence of any treaty on the subject with a foreign nation from whose justice a fugitive may be found in one of the states, and in the absence of any act of Congress upon the subject, a state can, through its own judiciary or executive, surrender him for trial to such foreign nation, is a question which has been under consideration by the courts of this country without any very conclusive result.

"In the case of Daniel Washburn, 4 Johns. Ch. 106; S. C. 8 Am. Dec. 548, who was arrested on a charge of theft committed in Canada, and brought before Chancellor Kent upon a writ of *habeas corpus*, that distinguished jurist held that, irrespective of all treaties, it was the duty of a state to surrender fugitive criminals. The doctrine of this obligation was presented with great ability by that learned jurist; but shortly afterward Chief Justice Tilghman, in the case of *Short* v. *Deacon*, 10 S. & R. 125, in the Supreme Court of Pennsylvania, held the contrary opinion—that the delivery up of a fugitive was an affair of the executive branch of the national Government, to which the demand of the foreign power must be addressed; that judges could not legally deliver up, nor could they command the executive to do so; and that no magistrate in Pennsylvania had the right to cause a person to be arrested in order to afford the President of the United States an opportunity to deliver him up, because the President had already declared he would not do so.

"There can be little doubt of the soundness of the opinion of Chief-Justice Taney, that the power exercised by the governor of Vermont is a part of the foreign intercourse of this country, which has undoubtedly been conferred upon the Federal government; and that it is clearly included in the treaty making power and the corresponding power of appointing and receiving ambassadors and other public ministers. There is no necessity for the states to enter upon the relations with foreign nations which are necessarily implied in the extradition of fugitives from justice found within the limits of the state, as there is none why they should, in their own name, make demand upon foreign nations for the surrender of such fugitives.

"At this time of day, and after the repeated examinations which have been made by this court into the powers of the Federal government to deal with all such international questions exclusively, it can

hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of this Union and a foreign government.

"Fortunately, this question, with others which might arise in the absence of treaties or acts of Congress on the subject, is now of very little importance, since, with nearly all the nations of the world with whom our relations are such that fugitives from justice may be found within their dominions or within ours, we have treaties which govern the rights and conduct of the parties in such cases. These treaties are also supplemented by acts of Congress, and both are in their nature exclusive.

"The case we have under consideration arises under one of these treaties made between the United States and Great Britain, the country with which, on account of our intimate relations, the cases requiring extradition are likely to be most numerous. This treaty of 1842 is supplemented by the acts of Congress of August 12, 1848, 9 Stat., 302, and March 3, 1869, 15 Stat., 337, the provisions of which are embodied in §§ 5270, 5272 and 5275 of the Revised Statutes, under Title LXVI., Extradition.* * *

"The treaty of 1842 being, therefore, the supreme law of the land, which the courts are bound to take judicial notice of and to enforce in any appropriate proceeding the rights of persons growing out of that treaty, we proceed to inquire, in the first place, so far as pertinent to the question certified by the circuit judges, into the true construction of the treaty. We have already seen that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offense than that for which he had been delivered up. This is a principle which commends itself as an appropriate adjunct to the discretionary exercise of the power of rendition because it can hardly be supposed that a government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offense, of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party. In exercising its discretion, it might be very willing to deliver up offenders against such laws as were essential to the protection of life, liberty and

person, while it would not be willing to do this on account of minor misdemeanors or of a certain class of political offenses in which it would have no interest or sympathy. Accordingly, it has been the policy of all governments to grant an asylum to persons who have fled from their homes on account of political disturbances and who might be there amenable to laws framed with regard to such subjects, and to the personal allegiance of the party. In many of the treaties of extradition between the civilized nations of the world, there is an express exclusion of offenders against such laws, and in none of them is this class of offenses mentioned as being the foundation of extradition proceedings. Indeed, the enumeration of offenses in most of these treaties, and especially in the treaty now under consideration, is so specific, and marked by such a clear line in regard to the magnitude and importance of those offenses, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others.

"It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject. It is unreasonable to suppose that any demand for rendition framed upon a general representation to the government of the asylum (if we may use such an expression) that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any particular offense with which he was charged, and even without specifying an offense mentioned in the treaty, would receive any serious attention; and yet such is the effect of the construction that the party is properly liable to trial for any other offense than that for which he was demanded, and which is described in the treaty. There would, under that view of the subject, seem to be no need of a description of a specific offense in making the demand. But, so far from this being admissible the treaty not only provides that the party shall be charged with one of the crimes mentioned, to wit, murder, assault with intent to commit murder, piracy, arson, robbery, forgery or the utterance of forged paper, but that evidence shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offense, and

that this evidence shall be such as according to the law of that country would justify the apprehension and commitment for trial of the person so charged. If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offense is charged to have been committed, there is very little use for this particularity in charging a specific offense, requiring that offense to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it. Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offense, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and of all the rights which the law governing that proceeding was intended to secure.

"If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

"The opposite view has been attempted to be maintained in this country upon the ground that there is no express limitation in the treaty of the right of the country in which the offense was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or fraud or by what pretense of

establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offense against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited, is met by the manifest scope and object of the treaty itself. The caption of the treaty, already quoted, declaring that its purpose is to settle the boundary line between the two governments; to provide for the final suppression of the African slave trade; adds, 'and for the giving up of criminals, fugitive from justice, *in certain cases*.' The treaty, then, requires, as we have already said, that there shall be given up, upon requisitions respectively made by the two governments, all persons charged with any of the seven crimes enumerated, and the provisions giving a party an examination before a proper tribunal, in which, before he shall be delivered up on this demand, it must be shown that the offense for which he is demanded is one of those enumerated, and that the proof is sufficient to satisfy the court or magistrate before whom this examination takes place that he is guilty and such as the law of State of the asylum requires to establish such guilt, leave no reason to doubt that the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offense and for no other.

"If there should remain any doubt upon this construction of the treaty itself, the language of two acts of Congress, heretofore cited, incorporated in the Revised Statutes, must set this question at rest. Rev. Stat. §§ 3272, 3275. * * *

"The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a congressional construction of the purpose and meaning of extradition treaties such as the one we have under consideration, and whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons bought from a foreign country into this under such proceedings.

"That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings, and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the

country before he is arrested upon the charge of any other crime committed previous to his extradition. * * *

"Upon a review of these decisions of the Federal and State courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition, that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." [1]

[1] Waite, C. J., dissented from the opinion of the court.

The decision in Rauscher's Case put an end to a controversy between the United States and England, of some years' standing, as to the interpretation of the extradition clause of the treaty of 1842. England had contended that a person surrendered under the treaty could be tried for no offence except the specific one for which extradition was accorded. The government of the United States had insisted, on the other hand, that a person once extradited could be indicted and tried for offences other than that charged in the demand for extradition. (See the cases of Lawrence and Winslow, Moore's Extradition, I., 196–219; Wharton's Digest, II., § 270; U. S. Foreign Relations, 1876.) For English practice, see *In re Windsor*, 1865, B. & S. 52; *Rex* v. *Dix*, 1902, 18 T. L. 231 (K. B.), and a note to this case in 15 Harv. Law Rev. 674.

The Supreme Court, in *Rauscher's Case*, upholds the English view of the question.

Previous to this authoritative decision, judicial opinion had been divided. In *accord* with this decision: *Com.* v. *Hawes*, 1877, 13 Bush. 697; *Blanford* v. *The State*, 1881, 10 Texas App. 627; *Watt's Case*, 1882, 14 Fed. Rep. 139; *State* v. *Vanderpool*, 1881, 39 Ohio State, 237. *Contra*: *Caldwell's Case*, 1871, 8 Blatch. 131; *Lagarve's Case*, 1873, 14 Abb. Pr. (N. S.), 333; *In re Miller*, 1885, 23 Fed. Rep. 32; *Ex parte Hibbs*, 1886, 26 Fed. Rep. 422.

The decisions of the French Court of Cassation are in accord with that of the United States Supreme Court: Dalloz, 1867, p. 281, No. 6, and ib, 1874, p. 502 and notes.

In *Rauscher's Case*, the Supreme Court expressed the opinion that, in the absence of treaty, there was under international law no right of extradition.

And further that, in the United States, extradition is a matter exclusively in the control of the Federal Government. See *Ex parte Holmes*, 1840, 12 Vt. 631; *Holmes* v. *Jennison*, 1840, 14 Peters, 540; *People* v. *Curtis*, 1872, 50 N. Y. 321.

In 1864 President Lincoln surrendered to the Spanish authorities one Arguëlles, an alleged fugitive from justice, without any treaty stipulation. The case was unfavorably criticised at the time and since, so that it has not been followed as a precedent.—Ed.

STATE v. PATTERSON.

Supreme Court of Missouri, 1893.

(116 *Missouri*, 505.)

Sherwood, J.[1] The third question presented by the record is that in relation to the jurisdiction of the court to try defendant on the third count of the indictment; and this contention is made because it is said the affidavit of Huston, on which the requisition was based, was not sufficiently comprehensive to embrace the charge contained in that count, and this contention was set forth in the trial court by a plea to the jurisdiction. The decided cases show some divergence of opinion on the question whether a fugitive from justice, when brought back to the State where the alleged crime occurred, can be tried for crimes other than the one for which he was extradited, some authorities holding that the fugitive cannot be tried except for the offence named in the warrant of extradition; others that when a person is properly charged with crime in the courts of the State to which he is brought, they will not inquire into the means whereby his extradition was affected. 8 American and English Encyclopædia of Law, pp. 648 *et seq.* As sustaining the latter view, a view entertained by the great preponderance and a majority of the authorities, are: *Ham* v. *State*, 4 Tex. App. 645; *State* v. *Ross*, 21 Iowa, 467; *State ex rel.* v. *Stewart*, 60 Wis. 587; *Waterman* v. *State*, 116 Ind. 51; *People* v. *Rowe*, 4 Park. Cr. 253; *Ker* v. *People*, 110 Ill. 627; *LaGrave's Case*, 59 N. Y. 110; *People ex rel.* v. *Cross*, 135 N. Y. 536; *In re Miles*, 52 Vt. 609; *State* v. *Smith*, 1 Bail. (So. Ca.), 283; *Dows' Case*, 18 Pa. St. 37; *Harland* v. *Territory*, 3 Strune (Wash.), 131; *Commonwealth* v. *Wright*, 158 Mass. 149; *Kentucky* v. *Dennison*, 24 How. (U. S.), 66; *In re Noyes*, 17 Alb. L. J. 407; *Ker* v. *Illinois*, 119 U. S. 436; *Mahon* v. *Justice*, 127 U. S. 700; *Cook* v. *Hart*, 146 U. S. 183; 1 Bishop Criminal Procedure [3d Ed.], sec. 224 *b*; 2 Moore on Extradition, sec. 643 *et seq.*

In the recent case of *Lascelles* v. *State*, 16 S. E. Rep. 945 (1892), the Supreme Court of the State of Georgia, per Lumpkin, J., ruled that the defendant, though indicted for the offence of being a common cheat and swindler, and for larceny after trust, and extradited from the State of New York on those charges, could be indicted and tried for a forgery committed in that State prior to his extradition. This case

[1] Only the opinion on this third point is given. — Ed.

was brought on error to the Supreme Court of the United States, *Lascelles* v. *Georgia*, 148 U. S. 537, where, after a review of the authorities, the judgment was affirmed. In that case, decided April 13, 1893, the Supreme Court of the United States, as did the Supreme Court of Georgia, clearly pointed out the distinction which should be taken between those cases of extradition arising between the several States of the Union under the Constitution and laws of Congress and those cases where a prisoner has been extradited from a foreign country under treaty stipulations, in which latter cases it has been ruled that a person thus extradited could only be tried for the specific offence which caused his extradition. *United States* v. *Rauscher*, 119 U. S. 407.

In *Ker* v. *People*, 110 Ill. 627, the defendant was kidnapped in Peru, and brought over to the State of California, where he was extradited on a requisition from the State of Illinois, on a charge of larceny, and returned to the State of Illinois whence he had fled, and there tried on a charge of embezzlement, and it was held that defendant had no valid ground of objection to the jurisdiction of the court which tried him. Carried on error to the Supreme Court of the United States, the judgment was affirmed. 119 U. S. 436.

In *Mahon* v. *Justice*, 127 U. S. 700, the defendant was kidnapped in West Virginia and forcibly carried back to Kentucky and held for trial of a crime alleged to have been committed in that State. The Governor of West Virginia demanded that defendant be restored, and meeting with refusal, resorted to *habeas corpus* in order to affect his restoration. The Circuit Court of the United States refused to discharge the defendant, and on appeal to the Supreme Court this judgment was affirmed. In that case it was contended that a right of asylum in the State to which he had fled, was possessed by the fugitive, which the Federal courts should enforce; but this right was declared in that case to have no existence under the *laws* of the United States, nor did they make any provision for the return of parties who without lawful authority had been abducted from another State; and that such forcible abduction from another State did not affect or impair the jurisdiction of the State to which they were brought, to try them for crimes committed therein.

That the jurisdiction of the court in which the indictment is found is not impaired by the method used to bring the accused before it, was the rule at common law and was declared in the early case of *Ex parte Scott*, 9 B. & C. 446. The result of the authorities heretofore cited is in the same direction.

There are a few others opposed to this view; among them are *State* v. *Hall*, 40 Kan. 338; *Ex parte McKnight* (Ohio), 28 N. E. Rep. 1034; *Cannon's Case*, 47 Mich. 481; but we are quite satisfied, both upon reason

and authority, that the rule announced in the former cases is the correct one and should prevail.

Therefore judgment affirmed. All concur.[1]

In Re CASTIONI.

QUEEN'S BENCH, 1890.

(*L. R. Queen's Bench Div.* 149.)

On an application for a writ of *habeas corpus*, the motion was made on behalf of Angelo Castioni, for an order *nisi* calling upon the solicitor to the Treasury, Franklin Lushington, Esq., a metropolitan police magistrate, and the consul-general of Switzerland, as representative of the Swiss Republic, to show cause why a writ of *habeas corpus* should not issue to bring up the body of Castioni in order that he might be discharged from custody.

The prisoner Castioni had been arrested in England on the requisition of the Swiss Government, and brought before the magistrate at the police court at Bow Street, and by him committed to prison for the purpose of extradition, on a charge of willful murder, alleged to have been committed in Switzerland.

The facts, which were contained in depositions sent from Switzerland, in the depositions taken before the magistrate at Bow Street, and in affidavits used on the hearing of the motion were shortly as follows: —

The prisoner was charged with the murder of Luigi Rossi, by shooting him with a revolver on September 11, 1890, in the town of Bellinzona, in the canton of Ticino, in Switzerland. The deceased, Rossi, was a member of the State Council of the canton of Ticino, and was about twenty-six years of age. The prisoner, Castioni, was a citizen of the same canton; he had resided for seventeen years in England, and arrived at Bellinzona on September 10, 1890. For some time previous to this date much dissatisfaction had been felt and expressed by a large number of the inhabitants of Ticino at the mode in which

[1] The leading cases on interstate rendition are: *Kentucky* v. *Dennison*, 1860, 24 How. 66; *Ex parte Reggel*, 1885, 114 U. S. 642; *Mahon* v. *Justice*, 1887, 127 U. S. 700; *Lascelles* v. *Georgia*, 1892, 148 U. S. 537. *State* v. *Patterson*, *supra*, states the law more briefly and cites authorities. As to the legal meaning of the phrase "fugitive from justice," see *Kingsbury's Case*, 1870, 106 Mass. 223, and *Jones* v. *Leonard*, 1878, 50 Ia. 106, and see valuable notes in 8 Harv. Law Rev. 494. On the subject in general, in addition to Moore's masterly treatise, see a brief note in 8 Harv. Law. Rev. 416. — ED.

the political party then in power were conducting the government of the canton. A request was presented to the Government for a revision of the constitution of the canton, under art. 15 of the constitution, which provides that "The constitution of the canton may be revised wholly or partially. * * * (b) at the request of 7,000 citizens presented with the legal formalities. In this case the council shall within one month submit to the people the question whether or not they wish to revise the constitution," and a law of May 9, 1877, prescribes the course to be adopted for the execution of letter (b) of art. 15.

The Government having declined to take a popular vote on the question of the revision of the constitution, on September 11, 1890, a number of the citizens of Bellinzona, among whom was Castioni, seized the arsenal of the town, from which they took rifles and ammunition, disarmed the gendarmes, arrested and bound or handcuffed several persons connected with the Government, and forced them to march in front of the armed crowd to the municipal palace. Admission to the palace was demanded in the name of the people, and was refused by Rossi and another member of the Government, who were in the palace. The crowd then broke open the outer gate of the palace, and rushed in, pushing before them the Government officials whom they had arrested and bound; Castioni, who was armed with a revolver was among the first to enter. A second door, which was locked, was broken open, and at this time, or immediately after, Rossi, who was in the passage, was shot through the body with a revolver, and died very soon afterwards. Some other shots were fired, but no one else was injured. Two witnesses, who were present when the shot was fired, and were called before the magistrate at Bow Street, identified Castioni as the person who fired the shot. One of the witnesses called for the prisoner was an advocate named Bruni, who had taken a leading part in the attack on the municipal palace. In cross-examination he said: "The death of Rossi was a misfortune, and not necessary for the rising." There was no evidence that Castioni had any previous knowledge of Rossi. The crowd then occupied the palace, disarmed the gendarmes who were there, and imprisoned several members of the Government. A provisional Government was appointed, of which Bruni was a member, and assumed the Government of the canton, which it retained until dispossessed by the armed intervention of the Federal Government of the Republic.

The magistrate was of opinion that the identification of Castioni was sufficient, and held upon the evidence that the bar to extradition specified in § 3 of the Extradition Act, 1870: "A fugitive criminal

shall not be surrendered if the offence in respect, of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the court before whom he is brought on *habeas-corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character," did not exist, and committed Castioni to prison. By the extradition treaty with Switzerland, dated Nov. 26, 1880, article 11: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove that the requisition for his surrender has in fact been made with a view to try and punish him for an offence of a political character."

Sir Charles Russell, for the prisoner; the Attorney-General, for the Crown.

DENMAN, J.:—"Looking at the extreme importance of this case, I should have been disposed, if I had felt any serious doubt as to the course we ought to pursue, to have taken time, not so much to consider what our judgment should be, as to take care to put it in the best possible shape, or even to reduce it to writing. But there are many considerations which apply to cases of this sort. One is, that here is a man in custody who has been in custody for a considerable time, and no greater delay than is reasonably necessary ought to be interposed if our decision should be one to the effect that he ought not to be in custody any longer. I am unable to entertain a doubt that this is a case in which we ought to order that the prisoner be discharged.

"There has been no legal decision as yet upon the meaning of the words contained in the act of 1870, upon the true meaning of which this case mainly depends. We have had many definitions suggested, and great light has been thrown upon the possible and probable meaning of the words by the arguments that have been addressed to us, applying not only the language of judges, but language used in text-books, language used by great political authorities, and in one case by a most learned philosopher. I think it has been useful in such a case as this that we should hear a discussion as to the possible meaning of the words, as it has occurred that they ought to be construed to people such as those whose opinions have been cited, and especially I may apply that observation to the case of my very learned brother whose assistance we have on this occasion in deciding the present case. I do not think it is necessary or desirable that we should attempt to put into language, in the shape of an exhaustive definition, exactly the whole state of things, or every state of things which bring a particular case within the description

of an offence of a political character. I wish, however, to express an opinion as to one matter upon which I entertain a very strong opinion. That is, that if the description given by Mr. John Stuart Mill, 'Any offence committed in the course of or furthering of civil war, insurrection, or political commotion,' were to be construed in the sense that it really means any act which takes place in the course of a political rising without reference to the object and intention of it, and other circumstances connected with it, I should say that it was a wrong definition and one which could not be legally applied to the words in the Act of Parliament. Sir Charles Russell suggested that 'in the course of' was to be read with the words following, 'or in furtherance of,' and that 'in furtherance of' is equivalent to 'in the course of.' I cannot quite think that this was the intention of the speaker, or is the natural meaning of the expression; but I entirely concur with the observation of the Solicitor-General that in the other sense of the words, if they are not to be construed as merely equivalent expressions, it would be a wrong definition. I think that in order to bring the case within the words of the Act and to exclude extradition for such an act as murder, which is one of the extradition offences, it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the state as to which is to have the government in its hands, before it can be brought within the meaning of the words used in the act.

"Sir Charles Russell has argued that in every case it is for the party seeking extradition to bear the onus of affirmatively bringing it within the meaning of those words. On the other hand, it has been contended that if there be an extraditable offence, the onus is upon the person seeking the benefit of those words to show a case in which extradition can be avoided. I do not myself think that it is possible to decide a case such as this, or the true meaning of those words, by applying any such test as on whom is the onus. I do not think it is intended that a scrap of a *prima facie* case on the one side should have the effect of throwing upon the other side the onus of proving or disproving his position. I look at the words of the act themselves and I think that they are against any such narrow technical mode of dealing with the case. The words of s. 3, subd. 1, are 'a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character.' The section itself begins: 'The following restrictions shall be observed with respect to the surrender of fugitive criminals.' There is nothing said as to upon whom is the *onus probandi*, or that

it shall be made to appear by one side or the other in such a case. It is a restriction upon the surrender of a fugitive criminal, and however it appears, if it does appear, that the act was, in the judgment of the court, an offence which would otherwise be an offence according to the laws of this country, but an offence of a political character, then wholly irrespective of any doctrine of onus on the one side or the other, that is within the jurisdiction, and he cannot be surrendered. It was at first contended, in opposition to the application for a *habeas corpus*, that if the magistrate upon this question once made up his mind, the court had no jurisdiction to deal with it. It appears to me that this proposition cannot be maintained on the very face of the act itself, which requires by s. 11 that the magistrate shall inform the prisoner that he may apply for a *habeas corpus*, and if he is entitled to apply for a *habeas corpus*, I think it follows that this court must have power to go into the whole matter, and in some cases, certainly if there be fresh evidence, or perhaps upon the same evidence, might take a different view of the matter from that taken by the magistrate.

"It seems to me that it is a question of mixed law and fact—mainly indeed of fact—as to whether the facts are such as to bring the case within the restriction of s. 3, and to show that it was an offence of a political character. I do not think it is disputed, or that now it can be looked upon as in controversy, that there was at this time existing in Ticino a state of things which would certainly show that there was more than a mere small rising of a few people against the law of the State. I think it is clearly made out by the facts of this case, that there was something of a very serious character going on—amounting, I should go so far as to say, in that small community, to a state of war. There was an armed body of men who had seized arms from the arsenal of the State; they were rushing into the municipal council chamber in which the government of the State used to assemble; they demanded admission; admission was refused; some firing took place; the outer gate was broken down; and I think it also appears perfectly plain from the evidence in the case that Castioni was a person who had been taking part in that movement at a much earlier stage. He was an active party in the movement; he had taken part in the binding of one member of the government. Some time before he arrived with his pistol in his hand at the seat of government, he had gone with multitudes of men, armed with arms from the arsenal, in order to attack the seat of government, and I think it must be taken that it is quite clear that from the very first, he was an active party, one of the rebellious party who was acting and in the attack against the government.

Now, that being so, it resolves itself into a small point, depending on the evidence which was taken before the magistrate, and anything that we can collect from the evidence that we have before us and from the whole circumstances of the case.

"Before dealing with the evidence, I will say one thing about the message which was objected to and which was read after a slight discussion, upon the understanding that we were not going to use that document as evidence of any particular fact, but that it would be only used as an important document showing that the government of the country had themselves looked upon this as a serious political rising, and a serious state of violence by a very large body of the people against the government. I mean so to use it, and I have never thought of using it in any other way. I think that was the understanding upon which we allowed it to be read, and I feel that I am not justified in using it for any other purpose. Then it is reduced to the question of whether, upon the depositions sent over, and upon the depositions before the magistrate and upon the fresh facts, if there be any, which are brought before us on the affidavits, we think that this was an act done, not only in the course of a political rising, but as part of a political rising. Here I must say at once that I assent entirely to the observation that we cannot decide that question merely by considering whether the act done at the moment at which it was done was a wise act in the sense of being an act which the man who did it would have been wise in doing with the view of promoting the cause in which he was engaged. I do not think it would be at all consistent with the real meaning of the words of the statute if we were to attempt so to limit it. I mean, I do not think it would be right to limit it in the way suggested by the cross-examination of Bruni, namely, by considering whether it was necessary at that time that the act should be done. The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part. Now, the only shadow of a suggestion of evidence to the contrary, I think, is the suggestion which appears on the face of some of the documents that he said something about his brother having been assassinated some years before. It was said in the message, which I have already said I do not rely upon as a statement of fact, that he did at the time he fired use the expression, 'My brother's death cries for vengeance!' That is in the document, and is a statement of fact which I do not rely upon, and I do not think that I am justified in relying upon it, though if I commented on that, I

should certainly say it was quite as capable of the construction put upon it by Sir Charles Russell, that he was not intending to murder Rossi, of whom he knew nothing, and of whose connection with any injury towards his brother there is not the slightest particle of evidence, as that it means anything of the kind suggested. Then it amounts to a very little, and it comes to discussion as to the facts of the case, and as to what was taking place at the exact moment at which the shot was fired. I have carefully followed the discussion as to the facts of the case, and if it were necessary I could go through them all one by one, and point out, I think, that, looking at the way in which that evidence was given, and at the evidence itself, there is nothing in my judgment to displace the view which I take of the case, that at the moment at which Castioni fired the shot, the reasonable presumption is, not that it is a matter of absolute certainty (we cannot be absolutely certain about anything as to men's motives) but the reasonable assumption is that he, at the moment knowing nothing about Rossi, having no spite or ill-will against Rossi, as far as we know, fired that shot; that he fired it thinking it would advance, and that it was an act which was in furtherance of, and done intending it to be in furtherance of the very object which the rising had taken place in order to promote, and to get rid of the Government, who, he might, until he had absolutely got into the place, have supposed were resisting the entrance of the people to that place. That, I think, is the fair and reasonable presumption to draw from the facts of the case. I do not know that it is necessary to give any opinion as to the exact moment when the shot was fired; there is some conflict about it. There is evidence that there was great confusion; there is evidence of shots fired after the shot which Castioni fired; and all I can say is, that looking at it as a question of fact, I have come to the conclusion that at the time at which that shot was fired he acted in the furtherance of the unlawful rising to which at that time he was a party, and an active party—a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. That being so, I think the writ ought to issue, and that we should be acting contrary to the spirit of this enactment, and to the fair meaning of it, if we were to allow him to be detained in custody longer."

Hawkins, J., said, among other things, "Now what is the meaning of crime of a political character? I have thought over this matter very much indeed, and I have thought whether any definition can be given of the political character of the crime—I mean to say, in language which is satisfactory. I have found none at all, and I can

imagine for myself none so satisfactory, and to my mind so complete, as that which I find in a work which I have now before me, and the language of which for the purpose of my present judgment I entirely adopt, and that is the expression of my brother Stephen in his History of the Criminal Law of England in vol. ii., pp. 70, 71. I will not do more than refer to the interpretations, other than those with which he agrees, which have been given upon this expression, 'political character'; but I adopt his definition absolutely. 'The third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle, etc., by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances. I do not wish to enter into details beforehand on a subject which might at any moment come under judicial consideration.' The question has come under judicial consideration, and having had the opportunity before this case arose of carefully reading and considering the views of my learned brother, having heard all that can be said upon the subject, I adopt his language as the definition that I think is the most perfect to be found or capable of being given as to what is the meaning of the phrase which is made use of in the Extradition Act. * * *

"I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time, one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over.

"For the reasons I have expressed, I am of opinion that this rule

ought to be made absolute, and that the prisoner ought to be discharged." [1]

[1] In *Re Ezeta*, 1894, 62 Fed. Reporter, 972, the court says: "In the *Castioni Case*, *supra*, decided in 1891, the question was discussed by the most eminent counsel at the English bar, and considered by distinguished judges, without a definition being found that would draw a fixed and certain line between a municipal or common crime and one of a political character. . . . Applying, by analogy, the action of the English court in that case to the four cases now before me, under consideration, the conclusion follows that the crimes charged here, associated as they are with the actual conflict of armed forces, are of a political character," pp. 998–999.

For further illustrations of political and non-extraditable offences see *Cazo's Case*, 1887, in 1 Moore on Extradition, 324; *The St. Alban's Raid*, 1864, ib. 322; *Burley's Case*, 1864, ib. 319.

Political offences: — "Most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the *government* and acts against the *oppressions* of the *government*. The latter are virtues, yet have furnished more victims to the executioner than the former. * * * The unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries. * * * Treasons, then, taking the *simulated* with the *real*, are sufficiently punished by exile." Jefferson to Carmichael and Short, 1792. 1 Am. St. Pap. For. Rel., 258.

In recent years there has been much discussion as to the nature of the crime committed in the assassination of the head of a government and of other public officials; whether it is to be put upon the footing of ordinary murder, or whether it shall be classed among those political offences which are exempt from extradition proceedings. Is it possible to make a distinction, as Mr. Jefferson suggests, between acts directed against tyranny, and those of a mere common-law character? Some such distinction has probably influenced statesmen in their dealings with the question of extradition. But as offences of this class have become more common and have invaded the dominions of the most liberal governments, public opinion would seem to be undergoing a change in regard to them.

Soon after the assassination of President Garfield, the United States Government entered into two treaties of extradition — that with Belgium of 1882, and that with Luxembourg of 1883 — in which it is stipulated that "an attempt against the life of the head of a foreign government or against that of any member of his family, when such attempt comprises the act either of murder or assassination or of poisoning, shall not be considered a political offence or an act connected with such an offence." An extradition treaty between the United States and Russia, 1893, contains a similar clause.

By an agreement between the governments of Russia and Prussia in 1888, for the basis of an extradition convention, attempts against the life of the Emperor of Russia or the members of his family are to be considered as extraditable offences. And further, "the fact that the crime or offence, in respect whereof extradition is demanded, has been committed for a political object, shall in no case be a reason for refusing extradition." Lowe's Life of Bismarck, II, 19.

On this subject, see Moore's Extradition, I., 303–326.

It is not usual for nations to surrender their own subjects even although they may be guilty of the crime with which they are charged. To prevent disputes of this nature it is customary to exclude such citizens from the operation of the treaty, by an express clause to that effect. See *Trimble's Case*, 1884, 1 Moore on Extradition, 166.

Section 13. — Jurisdiction of Offences Committed Abroad.

UNITED STATES v. DAVIS.

United States Circuit Court, District of Massachusetts, 1873.

(2 *Sumner*, 482.)

On an indictment for manslaughter it appeared that a gun was fired by defendant Davis, master of an American whale ship lying in the harbor of one of the Society Isles, by which a person on board a schooner (belonging to the natives and likewise lying within the same harbor) was killed.[1]

Story, J. We are of the opinion that, under the circumstances established in evidence, there is no jurisdiction in this cause. The

"The exemption of citizens from extradition has been maintained on various grounds. The only one which need seriously be noticed is that by the laws of most countries provision is made for the trial and punishment of their citizens for offences committed abroad, and that a state should not deliver up one of its citizens to be tried before a foreign tribunal when he can be punished at home under its own laws. By England and the United States alone are offences, even when committed by their citizens or subjects, treated as entirely local." Moore's Extradition, I., 153.

In negotiating extradition treaties these two states have therefore been willing to stipulate for the rendition of their own subjects or citizens. Indeed, the United States for a time refused to enter into extradition treaties on any other basis; but since 1852 this objection appears to have been waived, and a large number of our treaties of extradition, as that with Mexico, exempts each party from the obligation to surrender its own citizens.

But as this exemption from the obligation to surrender citizens was doubtless inserted in these treaties in deference to the opinion of other states, it is not probable that it was intended as an absolute prohibition upon the President of the United States; indeed, the wording of the clause would seem to imply a discretion on the part of the contracting parties.

In 1880, the Institute of International Law, after an exhaustive discussion of the subject of extradition, adopted a series of resolutions, the sixth of which was as follows: —

"Between countries whose criminal legislation rests on similar foundations, and which have confidence in each other's judicial institutions, the extradition of their own citizens would be a means of securing the good administration of criminal justice, because it ought to be desirable that the authorities of the *forum delicti commissi* should, if possible, be called upon to try the case."

See on this subject: Moore's Extradition, I., 152; Dana's Wheaton, pp. 189–191, notes. — Ed.

[1] Short statement substituted for that of the original report. — Ed.

Crimes Act of 1790, ch. 36, § 12, on which this indictment is founded gives to this court jurisdiction of the crime of manslaughter only when committed "on the high seas." We do not absolutely decide, whether the place where this offence, if any, was committed, was the high seas or not; because that might be affected by considerations of a very delicate and difficult nature, as whether it was high or low tide; for a place may at high water be the high seas, and yet at low water be strictly a part of the land, as is the case on our seashore, according to the well-known doctrine in *Constable's Case*, 5 Co. R. 106 a. In the present case, at high water the tide of the ocean had full sweep over the place in question; and it may be matter of grave consideration, whether, if the whole reef was at the time covered with water, the whole, including the place where the schooner lay, ought not to be deemed the high seas. But on this we give no opinion.

What we found ourselves upon in this case is, that the offence, if any, was committed, not on board of the American ship *Rose;* but on board of a foreign schooner belonging to inhabitants of the Society Islands, and, of course, under the territorial government of the king of the Society Islands, with which kingdom we have trade, and friendly intercourse, and which our Government may be presumed (since we have a consul there) to recognize as entitled to the rights and sovereignty of an independent nation, and of course entitled to try offences committed within its territorial jurisdiction. I say the offence was committed on board of the schooner; for although the gun was fired from the ship *Rose*, the shot took effect and the death happened on board of the schooner; and the act was, in contemplation of law, done where the shot took effect. So the law was settled in the case of *Rex* v. *Coombs*, 1 Leach. Cr. Cas. 432, where a person on the high seas was killed by a shot fired by a person on shore, and the offence was held to be committed on the high seas, and to be within the admiralty jurisdiction. Of offences committed on the high seas on board of foreign vessels (not being a piratical vessel), but belonging to persons under the acknowledged government of a foreign country, this court has no jurisdiction under the Act of 1790, ch. 36, § 12. That was the doctrine of the Supreme Court in *United States* v. *Palmer*, 3 Wheat. R. 610, and *United States* v. *Klintock*, 5 Wheat. R. 144, and *United States* v. *Holmes*, 5 Wheat. R. 412; applied, it is true, to another class of cases, but in its scope embracing the present. We lay no stress on the fact, that the deceased was a foreigner. Our judgment would be the same, if he had been an American citizen. We decide the case wholly on the ground, that the schooner was a foreign vessel, belonging to foreigners, and at the time under the acknowledged jurisdiction of a foreign government. We think, that under such circumstances,

the jurisdiction over the offence belonged to the foreign government, and not to the courts of the United States under the act of Congress.

The jury immediately returned a verdict of not guilty.

STATE v. CHARLES WYCKOFF.

Supreme Court of New Jersey, 1864.

(2 *Vroom*, 65.)

Beasley, C. J. The defendant was convicted before the Court of Oyer and Terminer, on an indictment containing two counts, the first of which charges him with the larceny of certain goods of a value exceeding twenty dollars, and the other with receiving goods knowing them to be stolen.

It appeared that the defendant was in New York at the time of the theft, and while in that State he made an arrangement with one Kelly to come into this State and steal the articles in question and to bring and deliver them to him in New York. This arrangement was carried into effect. The articles being stolen by Kelly and delivered to the defendant in New York. The defendant was not in this State at any time, from the inception to the conclusion of the transaction. The Court of Oyer and Terminer have asked the advisory opinion of this court upon two points.

First. Whether proof of the above stated facts will support the indictment.

Second. Has the defendant committed any offence indictable by the laws of this State?

In regard to the first point. The circumstances proved on the trial established the fact that Kelly was guilty of the crime of grand larceny in this State. Kelly therefore committed a felony, and consequently, as the defendant was not present, either actually or constructively, at the commission of the offence, he could not be a principal therein, but was an accessory before the fact. Kelly did the act and the defendant's will contributed to it, but it was committed while he was too far from the act to constitute him a principal. The distinction in felonies between the principal and accessories before and after the fact, is certainly technical, and has been sometimes regarded as untenable, but it is too firmly established to be exploded by judicial authority. It has always been regarded, in its essential features, as a part of the criminal law of this State, and its

existence is recognized both in our statutes and in a number of the reported decisions. *State* v. *Cooper*, 1 Green, 373, *Johnson* v. *State*, 2 Ducther, 324; *Cook* v. *State*, 4 Zab. 845.

The first count, therefore, charging the defendant as a principal in the larceny, is not sustained by the evidence. The crime of the accessory being dissimilar from that of the principal in its fundamental characteristics, must be distinctly charged in the pleadings. It has never been supposed that a count containing a statement of facts evincive of the fault of the party accused as a principal in a felony, was sufficient to warrant the conviction of such party as an accessory. 1 Chit. Crim. Law, 271, 2 id. 4; Wharton's Prec. of Indict. 97; *State* v. *Seran*, 4 Dutcher, 519. In the case of *Rex* v. *Plant*, 7 Car. & P. 575, it was expressly held that one indicted as principal in a felony could not be convicted of being an accessory before the fact. See, also, Whart. C. L. 115.

Neither will the second count of the indictment sustain the conviction. The evidence shows that the stolen goods were received by the defendant, with guilty knowledge, in the State of New York. But this was no offence against the laws of this State. The defendant therefore cannot be legally sentenced upon the conviction founded on the present indictment.

The remaining question is, has the defendant committed any offence indictable by the laws of this State?

His act was to incite and procure his agent or accomplice to enter this State and commit the felony. If the defendant had been in this State at the time of such procurement and indictment, he would have been guilty as an accessory before the fact; but what he did was done out of the State. Did he thereby become amenable to our criminal jurisdiction?

As the defendant did not act within this State in his own person, the point to be decided is, Did he do such act in this State by construction or in contemplation of law?

It is undoubtedly true that personal presence within the jurisdiction in which the crime is committed is not in all cases requisite to confer cognizance over the person of the offender, in the tribunals of the government whose laws are violated. In some cases the maxim applies, *Crimen trahit personam*. Thus, where a person being within one jurisdiction, maliciously fires a shot which kills a man in another jurisdiction, it is murder in the latter jurisdiction, the illegal act being there consummated. So in the case of *The United States* v. *Davies*, 4 Sumner, 485, the defendant was accused of shooting from an American ship and killing a man on board a foreign schooner. Chief Justice Story said, "the act was, in contemplation of law, done

where the shot took effect. He would be liable to be punished by the foreign government." The same principle was recognized by this court in the case of *The State* v. *Carter*,[1] 3 Dutcher, 499. So when a crime is committed by an innocent living agent, the projector of such crime being absent from the country whose laws are infringed. Such was the case of *The People* v. *Adams*, 3 Denio, 190. In this latter case the facts were these: the defendant was indicted in the City of New York for obtaining money from a firm of commission merchants in that city, by the exhibition of fictitious receipts. The defendant pleaded that he had never been in the State of New York — that the receipts were drawn and signed in Ohio, and that the offence was committed by their being presented to the firm in New York by innocent agents employed by the defendant in Ohio. It was held that such plea was bad and disclosed no defence. A number of authorities maintaining the same view will be found collected in the opinion of the judge who delivered the decision of the court in the case last cited.

The rule, therefore, appears to be firmly established, and upon very satisfactory grounds, that where the crime is committed by a person absent from the country in which the act is done, through the means of a merely material agency or by a sentient agent who is innocent, in such cases the offender is punishable where the act is done. The law implies a constructive presence from the necessity of the case; otherwise the anomaly would exist of a crime but no responsible criminal.

But the more difficult question remains to be considered, which is — in case of a felony committed here by a responsible agent, who is therefore the principal felon and punishable by our laws — can the

[1] In this case it was held that an indictment charging a felonious assault and battery in New York, and that the party injured came into and died from its effects in New Jersey, charges no crime against this State; that the New Jersey statute cannot embrace cases where the act complained of has been wholly done within the territorial limits of another State; that in such a case the State (New York) in which the crime was committed has jurisdiction and a New Jersey statute to punish a New York crime is necessarily void. It should be noted, however, that when the offence is committed in both States, as in shooting and killing across the line, for instance, either or both States might take cognizance of the act and punish the crime, or to cite the exact language of the case, at p. 500: "This is not the case where a man stands on the New York side of the line, and shooting across the border, kills one in New Jersey. When that is so, the blow is in fact struck in New Jersey. It is the defendant's act in this State. The passage of the ball, after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, wherever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. Whether the sword, the ball, or any other missile, passes over a boundary in the act of striking, is a matter of no consequence. The act is where it strikes, as much where the party who strikes stands out of the State, as where he stands in it." — Ed.

procurer, who is an accessory before the fact and whose acts of procurement have been done in a foreign jurisdiction, be indicted and punished for such procurement in this State?

The general rule of the law has always been that a crime is to be tried in the place in which the criminal act has been committed. It is not sufficient that part of such act shall have been done in such place, but it is the completed act alone which gives jurisdiction. So far has this strictness been pushed that it has been uniformly held, that if a felony was committed in one county, the accessory having incited the principal in another county, such accessory could not be indicted in either. This technicality, which, when applied to the several counties of the same kingdom or state, appears to have little to recommend it, was nevertheless so firmly established that it required the statute of 2 and 3 Ed. VI., c. 24, to abolish it, and this statute has been re-enacted in this State. Nix. Dig. 199. Rev., p. 282, sect. 78. And so in like manner the same rigor existed in cases in which death ensued out of the kingdom from a felonious stroke inflicted within it, it being decided that neither the principal nor accessory was, under such circumstances, indictable. This imperfection in the criminal system was removed by the statute of 2 Geo. II., c. 21, and which has been substantially copied in the third section of the act of this State before referred to in Nix. Dig. 200, *supra*. For the rules of law which were thus modified by statute, see 3 Inst. 48; *Lacye's Case*, 1 Leo. 270; 2 Rep. 93.

If, then, the accessory by the common law was answerable only in the county in which he enticed the principal, and that, too, when the criminal act was consummated in the same county, it would seem to follow necessarily in the absence of all statutory provision, that he is wholly dispunishable when the enticement to the commission of the offence has taken place, out of the State in which the felony has been perpetrated. Under such a condition of affairs it is not easy to see how the accessory has brought himself within the reach of the laws of the offended State. His offence consists in the enticement to commit the crime; and that enticement, and all parts of it, took place in a foreign jurisdiction. As the instrumentality employed was a conscious guilty agent, with free will to act or to refrain from acting, there is no room for the doctrine of a constructive presence in the procurer. Applying to the facts of this case the general and recognized principles of law, it would seem to be clear that the offence of which the defendant has been guilty is not such as the laws of this State can take cognizance of. We must be satisfied to redress the wrong which has been done to one of our citizens, and to vindicate the dignity of our laws by the punishment of the wrongdoer who came within our

territorial limits. As for the defendant, who has never been, either in fact or by legal intendment, within our jurisdiction, he can be only punished by the authority of the State of New York, to whose sovereignty alone he was subject at the time he perpetrated the crime in question.

The principle involved in this case has not often been the subject of judicial consideration, nor has it received much attention from the text writers. But in the few cases to be found in the reports upon the point, a view similar to the above has been expressed. The case of *The State* v. *Moore*, 6 Foster, 448, was, in all its features, identical with that now before this court, and the result was a discharge of the prisoner, on the ground that the crime of the accessory had not been committed within the jurisdiction of New Hampshire.

The case *Ex parte Smith*, 6 Law Reporter, 57, was to the same effect. The same principle was again considered, though in a somewhat different aspect, in the case of *The State* v. *Knight*,[1] 1 Taylor's

[1] By a North Carolina statute of 1784, Ch. 25, § 4, counterfeiting and passing in a foreign or neighboring State such counterfeit bills of North Carolina was made punishable as if committed in North Carolina. A Virginian named Knight was convicted under this statute, and on appeal the court said: "This State cannot declare that an act done in Virginia by a citizen of Virginia, shall be criminal and punishable in this State: our penal laws can only extend to the limits of this State, except as to our own citizens; but granting that our Legislature could enact laws for the punishment of offences committed in Virginia, still this clause only extends by implication to acts done in Virginia; and no penal law can be construed by implication nor otherwise than by the express letter." Defendant was therefore discharged.

In *Commonwealth* v. *Macloon*, 1869, 101 Mass. 1, it was held in an elaborate opinion by Mr. Justice Gray that a citizen of another state or of a foreign country may be convicted, under a statute of Massachusetts, of the manslaughter of a person who died within Massachusetts, from injuries inflicted upon him by the accused in a foreign merchant vessel upon the high seas; that in such a case the "mortal wound given or other violence or injury inflicted" took effect within and was therefore punishable in Massachusetts. See the adverse criticisms of this case and its doctrine in 1 Bishop's New Criminal Law, §§ 115–116, note 1, pp. 60–66. In illustrating the doctrine that acts done out of the country but taking effect here may rightly be punished where they take effect, Bishop says (§ 110 of the same work): "Where a man, standing beyond the outer line of our territory, by discharging a ball over the line kills another within it; or, himself being abroad, circulates libels here; or in like manner obtains here goods by false pretences; or does any other crime in our own locality against our law; he is punishable, though absent, the same as if he were present."

Thus, in the thoroughly excellent case of *Commonwealth* v. *Blanding*, 1825, 3 Pick. Mass. 304, it was proved that the defendant delivered the writing set forth in the indictment to the printer of the Providence Gazette, at Providence, in the State of Rhode Island, and that it was published in that paper at the request of the defendant, who acknowledged that he was the author of it; it was likewise proved that the paper circulates in Rehoboth (in the county of Bristol, Mass.), and has so circulated previously to such publication; and that the number containing this writing was received and circulated in that town. On this statement of facts, the defendant was convicted

ak v Hall 114 N.C. 909.

Rep. (N. C.), 65, and the opinion intimated by the court entirely accorded with those expressed in the two cases first above cited. These are the only judicial examinations of the matter now in hand which I have met with in the course of my research.

Upon authority, then, as well as upon principle, I think the present indictment cannot be sustained, and that the defendant has not committed any offence which is indictable by force of the laws of this State.

Let the Court of Oyer and Terminer be advised accordingly.

for libel and conviction was affirmed on appeal. See, also, *Rex* v. *Johnson*, 1804, 7 East, 65.

Cutting's Case, which excited so much interest and comment in international circles was on all fours with this. One Cutting, an American citizen, published a libel in a Texan paper reflecting on the character of one Medina, a Mexican. The paper circulated in Mexico, as in the case of *Commonwealth* v. *Blanding* the paper circulated in Massachusetts, and on being found in Mexico, Cutting was apprehended, tried and sentenced to fine and imprisonment. The American Government demanded an indemnity for Cutting's imprisonment. See report on *Cutting's Case* by J. B. Moore, 1887.

The position of the United States in *Cutting's Case*, that the Mexican law giving to its courts the jurisdiction of extraterritorial offences, is contrary to custom and international law, and that the principles involved in it are practically obsolete in practice, would seem not to be borne out by facts. Aside from the question whether the common-law doctrine of territorial jurisdiction is the more expedient practical rule, it may at least be said that it is by no means so universally prevalent as to warrant the assertion that it has become a rule of international law. Not only are there many codes which go quite as far in the direction of extraterritorial jurisdiction as that of Mexico, but there is probably not a state which adheres strictly to the territorial theory. In the first place, practically all states punish their own citizens for offences of one kind or another committed in foreign countries. Even England punishes not only for treasonable acts, but also for bigamy, murder, manslaughter committed abroad by her subjects. The laws of the United States, too, provide for the punishment of certain offences committed abroad by their citizens. Revised Statutes, § 5335; and see acts of August 18, 1856, and February 25, 1863.

Secondly, in regard to foreigners, there are a large number of codes which take jurisdiction of offences against the state committed by them in foreign states; and a lesser number which go farther, and extend their jurisdiction to offences against individuals. Of this number are Austria, Hungary, Italy, Norway, Sweden, Russia, Greece, and Brazil, as well as Mexico.

As previously said, the *Cutting Case* is similar to that of *Commonwealth* v. *Blanding*, being a libel uttered in Texas, but circulated and having its effect in Mexico; is the offence different in principle from that of wounding a man in one state by firing across the boundary from another state?

Among jurists there is a wide difference of opinion in regard to the merits of the two systems — the "territorial" and the "personal" theories of jurisdiction. (T. E. Holland, Jurisprudence, 9th ed., pp. 400-405; F. Wharton, Philosophy of Criminal Law, p. 309 *et seq.*; L. v. Bar, Private International Law, Translation by G. R. Gillespie, p. 620 *et seq.*; Wharton's Conflict of Laws, § 1810; "Case of A. K. Cutting, by the Minister of Foreign Relations of the Republic of Mexico," 1888; Hall's Foreign Powers and Jurisdiction of the British Crown, 1–15.) — ED.

THE UNITED STATES v. THOMAS J. L. SMILEY *et al.*

UNITED STATES CIRCUIT COURT, DISTRICT OF CALIFORNIA, 1864.

(6 *Sawyer*, 640.)

The steamer *Golden Gate* left San Francisco for Panama on July 21, 1862, and had on board "treasure" amounting to $1,450,000. On July 27, when three miles and a half from the Mexican shore, fire broke out, the steamer headed for the shore and went to pieces about two hundred and fifty feet from the shore, at a point fifteen miles north of Manzanillo, in Mexico. Of the money on board $1,200,000 were ultimately recovered in port by Smiley and his associates. The shippers and Smiley disagreeing about his share of the recovered treasure, he was indicted in March, 1864, in U. S. Circuit Court for plundering and stealing the treasure from the *Golden Gate*, under the ninth section of act of Congress of March 3, 1825 (4 St. L., 116) which provides "that if any person . . . shall plunder, steal or destroy any money, goods, merchandise or other effects from or belonging to any ship or vessel or boat or raft, which shall be wrecked, lost, stranded, or cast away upon the sea, or upon any reef, shore, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States," he "shall be deemed guilty of a felony," &c.[1]

By the court, Mr. Justice FIELD. We are not prepared to decide that the statute does not apply to a case where the vessel has gone to pieces, to which the goods belonged of which larceny is alleged. It would fail of one of its objects if it did not extend to goods, which the officers and men of a stranded or wrecked vessel had succeeded in getting ashore, so long as a claim is made by them to the property, though before its removal the vessel may have been broken up. We are inclined to the conclusion that, until the goods are removed from the place where landed, or thrown ashore, from the stranded or wrecked vessel, or cease to be under the charge of the officers or other parties interested, the act would apply if a larceny of them were committed, even though the vessel may in the mean time have gone entirely to pieces and disappeared from the sea. But in this case the treasure taken had ceased to be under the charge of the officers of the *Golden Gate*, or of its underwriters, when the expedition of Smiley was fitted out, and all efforts to recover the property had been given up by them. The treasure was then in the situation of derelict or abandoned prop-

[1] This statement is substituted for that of the report. — ED.

erty, which could be acquired by any one who might have the energy and enterprise to seek its recovery. In our judgment the act was no more intended to reach cases where property thus abandoned is recovered, than it does to reach property voluntarily thrown into the sea, and afterwards fished from its depths.

But if the act covered a case where the property was recovered after its abandonment by the officers of the vessel and others interested in it, we are clear that the circuit court has not jurisdiction of the offence here charged. The treasure recovered was buried in the sand several feet under the water, and was within one hundred and fifty feet from the shore of Mexico. The jurisdiction of that country over all offences committed within a marine league of its shore, not on a vessel of another nation, was complete and exclusive.

Wheaton, in his treatise on International Law, after observing that "the maritime territory of every state extends to the ports, harbors, bays, and mouths of rivers and adjacent parts of the sea inclosed by headlands, belonging to the same state," says: "The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the state. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation." (Pt. 2, c. 4, sec. 6.)

The criminal jurisdiction of the government of the United States — that is, its jurisdiction to try parties for offences committed against its laws — may in some instances extend to its citizens everywhere. Thus, it may punish for violation of treaty stipulations by its citizens abroad, for offences committed in foreign countries where, by treaty, jurisdiction is conceded for that purpose, as in some cases in China and in the Barbary states; it may provide for offences committed on deserted islands, and on an uninhabited coast, by the officers and seamen of vessels sailing under its flag. It may also punish derelictions of duty by its ministers, consuls, and other representatives abroad. But in all such cases it will be found that the law of Congress indicates clearly the extraterritorial character of the act at which punishment is aimed. Except in cases like these, the criminal jurisdiction of the United States is necessarily limited to their own territory, actual or constructive. Their actual territory is coextensive with their possessions, including a marine league from their shores into the sea.

This limitation of a marine league was adopted because it was formerly supposed that a cannon-shot would only reach to that extent. It is essential that the absolute domain of a country should extend into the sea so far as necessary for the protection of its inhabitants against injury from combating belligerents while the country itself is

neutral. Since the great improvement of modern times in ordnance, the distance of a marine league, which is a little short of three English miles, may, perhaps, have to be extended so as to equal the reach of the projecting power of modern artillery. The constructive territory of the United States embraces vessels sailing under their flag; wherever they go they carry the laws of their country, and for a violation of them their officers and men may be subjected to punishment. But when a vessel is destroyed and goes to the bottom, the jurisdiction of the country over it necessarily ends, as much so as it would over an island which should sink into the sea.

In this case it appears that the *Golden Gate* was broken up; not a vestige of the vessel remained. Whatever was afterwards done with reference to property once on board of her, which had disappeared under the sea, was done out of the jurisdiction of the United States as completely as though the steamer had never existed.

We are of opinion, therefore, that the Circuit Court has no jurisdiction to try the offence charged, even if, under the facts admitted by the parties, any offence was committed. According to the stipulation, judgment sustaining the demurrer will be, therefore, entered and the defendants discharged.[1]

[1] "In England and America, the jurisdiction is generally assumed over its citizens in respect to all civil acts, transactions, rights, or duties done or arising abroad. This is true, even though the act be a tort, and though it amount to a breach of the peace. Thus a British subject is liable to a civil action in England for an assault and battery committed by him, say in Italy. The same would be true in the United States. But by a very ancient principle of the English common law, adopted in this country, all crimes are strictly local, and the offenders are justiciable only in the countries where the criminal act is done." Pomeroy's Int. Law, 205.

It is, however, true that in a few instances English and American courts take jurisdiction of crimes committed by their respective subjects and citizens beyond their territorial limits, other than on the high seas, but they do not, as is commonly the case on the Continent, try foreigners for offences against their municipal laws.

In *Macleod* v. *Atty.-Gen.*, 1891, A. C. 455, Halsbury, L. C., laid down as English law that "all crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature has no power whatever."

"It is, however, a decided and settled principle in the English and American law, that the penal laws of a country do not reach in their disabilities or penal effects, beyond the jurisdiction where they are established. *Folliott* v. *Ogden*, 1 H. Black. 123, 135; Lord Ellenborough, *Wolff* v. *Oxholm*, 6 M. & S. 99; *Commonwealth of Massachusetts* v. *Green*, 17 Mass. 514, 539–543; *Scoville* v. *Canfield*, 14 Johns. 338, 440" (1 Kent, Com. 38, note b). See also, *U. S.* v. *Pelican Ins. Co.*, 1887, 127 U. S. 265, 289–91 and Hall, Int. Law, 218–222. — Ed.

SECTION 14. — EXTRATERRITORIAL ACTS BY ORDER OF THE STATE.

BURON v. DENMAN.

COURT OF EXCHEQUER, 1848.

(2 *Exchequer*, 167.)

PARKE, B.[1] (in summing up). — With respect to the issue, whether the plaintiff was possessed of these slaves, your verdict must be for the plaintiff. The law on the subject of slaves has been settled by the case of *Le Louis*, 2 Dod. 210, which has been referred to. That case was decided, in the year 1817, by Sir William Scott, who went fully into the question of the legality of the slave trade, and laid down certain positions, which have since been acquiesced in, both in this country and abroad. Those positions are, first, that dealers in slaves are not pirates by the law of nations, and can only be made so by and according to the terms of a treaty with the country to which they belong prohibiting the slave trade; secondly, that trading in slaves is not a crime by the law of nations; thirdly, that the right of stopping and searching ships in time of peace is not a right which can belong to any nation except by contract with the nation to which such ships belong; and, fourthly, that if there be a law in a particular country prohibiting the slave trade, it is not open to every one to punish the offender against that law, but proceedings must be taken in the tribunals of his own country. Those propositions being clear, a question arises, whether the plaintiff can maintain this action for taking away his slaves. It is not necessary to decide whether, if he had been simply in the actual possession of slaves, using them as slaves, he could have recovered against any person who took them away: on that point it is not necessary to give an opinion, because, according to the evidence on both sides, he was living at Gallinas, where it was lawful to possess slaves. It is contended that, by the law of Spain, the plaintiff cannot possess a property in slaves for the purpose of exporting them, *as slaves*, to the West Indies. However, there is no evidence of such law, and we are all, therefore, of opinion that the second and fourteenth issues, both as to the slaves and the goods, must be found for the plaintiff.

The principal question is, whether the conduct of the defendant, in carrying away the slaves, and committing the other alleged trespasses,

[1] Statement of the case is omitted. — ED.

can be justified as an act of state, done by authority of the Crown. It is not contended that there was any previous authority. If the defendant had merely instructions according to the terms of the treaty set out in the act of Parliament, those instructions would only have extended to the stopping of ships on the high seas, within the limits agreed to by the treaty with the Spanish crown. Therefore the justification of the defendant depends upon the subsequent ratification of his acts. A well-known maxim of the law between private individuals is, "Omnis ratihabitio retrotrahitur et mandato æquiparatur." If, for instance, a bailiff distrains goods, he may justify the act either by a previous or subsequent authority from the landlord; for, if an act be done by a person *as agent*, it is in general immaterial whether the authority be given prior or subsequent to the act. If the bailiff so authorized be a trespasser, the person whose goods are seized has his remedy against the principal. Therefore, generally speaking, between subject and subject, a subsequent ratification of an act done *as agent* is equal to a prior authority. That, however, is *not* universally true. In the case of a tenant from year to year, who has, by law, a right to a half-year's notice to quit, if such notice be given by an agent, without the authority of the landlord, the tenant is not bound by it. Such being the law between private individuals, the question is whether the act of the sovereign, ratifying the act of one of his officers, can be distinguished. On that subject I have conferred with my learned brethren, and they are decidedly of opinion that the ratification of the Crown, communicated as it has been in the present case, is equivalent to a prior command. I do not say that I dissent; but I express my concurrence in their opinion with some doubt, because on reflection there appears to me a considerable distinction between the present case and the ordinary case of ratification by subsequent authority between private individuals. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either; if the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass. Whether the remedy against the Crown is to be pursued by petition of right, or whether the injury is an act of state without remedy, except by appeal to the justice of the state which inflicts it, or by application of the individual suffering to the government of his country, to insist upon compensation from the government of this — in either view, the wrong is no longer action-

able. I do not feel so strong upon the point as to say that I dissent from the opinion of my learned brethren; therefore, you have to take it as the direction of the court, that if the Crown, with knowledge of what has been done, ratified the defendant's act by the Secretaries of State or the Lords of the Admiralty, this action cannot be maintained. In the documents which have been read there is ample evidence of ratification, for the Secretary of State for Foreign Affairs, the Lords of the Admiralty, and the Secretary of State for the Colonial Department, on receiving the report of the Governor of Sierra Leone, and the account of the transactions given by the defendant himself, expressed their approbation of what he had done. The acts, indeed, have never been published, and that is one of the circumstances which created a doubt in my mind. But, although the ratification was not known before this action was commenced, that fact makes no difference in the opinion of the court. A previous command would be unknown, if given verbally; and a subsequent ratification, though unknown, will have the same effect.

It is argued, on the part of the plaintiff, that the Crown can only speak by an authentic instrument under the Great Seal, and that, therefore, the ratification ought to have been under the Great Seal. We are clearly of opinion, that, as the original act would have been an act of the Crown, if communicated by a written or parol direction from the Board of Admiralty, so this ratification, communicated in the way it has been, is equally good. I should observe that the court are of opinion that it is not necessary for the defendant to prove the pleas which expressly state the authority of the Crown; for if this act, by adoption, becomes the act of the Crown, the seizure of the slaves and goods by the defendant is a seizure by the Crown, and an act of state for which the defendant is irresponsible, and, therefore, entitled to a verdict on the plea of "Not guilty."

The jury found that the Crown had ratified the act of the defendant, with full knowledge of what he had done, whereupon a verdict was taken for him on the 4th, 9th, and 16th pleas. A verdict was found for the plaintiff on the pleas of not possessed of the slaves and goods; and the plea of "Not guilty" was entered, by consent, for the plaintiffs.

F. Robinson tendered a bill of exceptions to the above ruling; but the plaintiff afterwards obtained an order to discontinue, certain terms of settlement of this and other similar actions having been agreed to.[1]

[1] In speaking of acts of state, Sir James Stephen uses the following well-chosen language: "The leading case on this subject is *Buron* v. *Denman*. * * * This principle has been asserted and acted upon in many later cases. One of the most pointed is *The Secretary of State for India* v. *Kamachee Baye Sahiba*. In this case the Rajah of

Section 15. — Extraterritorial Acts done by a State, in Self-Defence.

COMMONWEALTH v. BLODGETT AND ANOTHER.

Supreme Judicial Court of Massachusetts, 1846.

(12 *Metcalf*, 56).

Shaw, C. J.[1] The great Rhode Island controversy, threatening, and at one time involving, the dangers and troubles of insurrection and

Tanjore, having died without issue male, the East India Company seized the Rajah on the ground that the dignity was extinct for want of a male heir, and that the property lapsed to the British Government. The judicial committee of the Privy Council held, on a full examination of the facts, that the property claimed by the Rajah's widow "had been seized by the British Government, acting as a sovereign power, through its delegate, the East India Company, and that the act so done, with its consequences, was an act of state over which the Supreme Court of Madras had no jurisdiction. * * * Even if a wrong had been done, it is a wrong for which no municipal court can afford a remedy."

"In order to avoid misconception it is necessary to observe that the doctrine as to acts of state can apply only to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subjects there can be no such thing as an act of state. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not. On this ground the courts were prepared to examine into the legality of the acts done under Governor Eyre's authority in the suppression of the insurrection in Jamaica. The acts affected British subjects only. But as between British subjects and foreigners, the orders of the Crown justify what they command so far as British courts of justice are concerned. In regard to civil rights, this, as I have shown, has been established by express and solemn decisions; and it is impossible to suppose that a man should be a criminal when he is not even a wrongdoer," (Stephen's History of Criminal Law, Vol. II., pp. 64–65.) See, also, Pollock's Torts, 8th ed., pp. 110–113. Dicey (Law of the Constitution, 5th ed., p. 287) says: "*Buron* v. *Denman*, 2 Ex., 167, is sometimes cited as showing that obedience to the orders of the Crown is a legal justification to an officer for committing a breach of law, but the decision in that case does not, in any way, support the doctrine erroneously grounded upon it. What the judgment in *Buron* v. *Denman* shows is that an act done by an English military or naval officer in a foreign country to a foreigner in discharge of

[1] Statement of the case, as well as part of the opinion, omitted. For a detailed statement of the rebellion out of which the case in the text arose, see A. M. Mowry's Dorr War, 1901. — Ed.

civil war, out of which this case grew, having happily passed away, the case itself has lost much of the interest with which it was once invested. It presents questions of unusual magnitude and importance, lying beyond the scope of those investigations with which the administration of the criminal law is usually conversant; but happily they are questions of rare occurrence. We shall allude to the facts, very briefly, to make the points intelligible.

The indictment was originally returned against three persons, of whom one was acquitted and the others convicted. It was founded on the provisions of the Rev. Sts., c. 125, § 20, which prohibit the unlawful and forcible seizure, imprisonment, or abduction of persons.

The proof, on the part of the prosecution, tended to show that the

orders received from the Crown may be an act of war, but does not constitute any breach of law for which an action can be brought against the officer in an English court. Compare *Feather* v. *The Queen*, 6 B. & S., 257, 295, *per curiam*." See further, *Dobree* v. *Napier*, 1836, 2 Bingham's New Cases, 781, in which the command of the *Queen of Portugal* was held sufficient justification for seizure of plaintiff's vessel by a British officer serving temporarily in the Portuguese Navy; *Underhill* v. *Hernandez*, 1897, 168 U. S. 250, in which the same doctrine was applied. *McLeod's Case*, famous in the annals of diplomacy, is the best known American case on this subject. The account in *Underhill* v. *Hernandez*, 1895, 25 U. S. Appeals, 573, *ante*, 67, briefly states the facts and decision. See, also, *People* v. *McLeod*, 1841, 25 Wend. 483, 1 Hill, 375.

In speaking of the New York court, Mr. Webster said: "I was utterly surprised at the decision of the court on the *habeas corpus*. On the peril and risk of my professional reputation, I now say that the opinion of the court of New York is not a respectable opinion, either on account of the result at which it arrives, or the reasoning on which it proceeds." Webster's Works, Vol. V., p. 129. See, also, 25 Wend. App. and 3 Hill, App., for criticism and defence of Justice Cowen's opinion in 25 Wend. 483, 566.

In the above instances the ratification of the agent's act was express, but it need not be so; tacit acquiescence is under certain circumstances sufficient. In the *Rolla*, 1807, 6 Rob. 364, Sir William Scott said: "It has been also farther contended that the commander, in this expedition particularly, did not possess this authority; because it has appeared from the result of a subsequent inquiry into his conduct that he had acted irregularly in entering into it without orders. But however irregularly he may have acted towards his own government the subsequent conduct of government in adopting that enterprise, by directing a further extension of that conquest, will have the effect of legitimating the acts done by him, so far at least as the subjects of other countries are concerned. The government has not disclaimed the acquisitions as obtained wrongfully; on the contrary they have recognized his acts by seizing Maldonado, and by retaining the footing which had been acquired for them in that country, thereby expressing their recognition of the seizure, as a seizure made by the forces of this country validly applied. I am therefore of opinion that the blockade is not to be impeached on the ground of want of regular authority; and I have no hesitation in pronouncing that, however irregularly Sir Home Popham may be deemed to have acted towards his own government, it is that for which he is in no manner answerable to other states; and that it is not open to the individual subjects of other countries to dispute the validity of the blockade on that account." — Ed.

defendants, with about twenty other persons, armed with military weapons, about the hour of one o'clock at night, broke and entered the house of Jeremiah Crooks, who kept a tavern in Bellingham, in this county, and there seized and bound the four persons named in the indictment, to wit, William T. Olney, Oliver Ballou, Arnold Whipple, and Timothy Walker, kept them there some hours in custody, and then carried them bound to Rhode Island. Some circumstances of aggravation, in the conduct of the defendants, are stated in the bill of exceptions, which seem not material to any principle involved in the case.

It will not be necessary to recapitulate or even make a summary of the facts. They are fully detailed in the bill of exceptions. Those that concern these defendants more particularly are as follows: That an organized attempt was made to overthrow the existing government of the State, by force of arms; that the Legislature had, by an act in due form, declared the State to be under martial law; that William G. McNeill, Esq., had been appointed major-general and commander in chief of the forces raised by the State to oppose the insurrection; that the insurgents, organized and in military array, were stationed, in some force, at Chepachet and Woonsocket, villages bordering on the line of Massachusetts. It further appears, that on the evening of the 27th of June, the camp of the insurgents, at Chepachet, and other persons there assembled, were advised to disperse; that they did not afterwards appear in any considerable force, but that fears were entertained, by the people of Rhode Island, that they would again assemble within the limits of Connecticut or Massachusetts, and again annoy the people of Rhode Island; that on the 29th, an order was published, stating that there was no longer a necessity for the continuance of the troops in general in the field, and that they might return to their several homes; that various orders were given, with a view to arresting the fugitives, whether within the limits of the State or not, to the extent of fifty miles from Chepachet; that by order of Major Martin, the defendant Blodgett, who was in the military service of the State, with the other defendant, Hendrick, as a guide, with about twenty men, proceeded, as before stated, to Crooks's tavern in Bellingham, and there found and arrested the four persons named, who had been in arms against the State, but were not then in arms, or engaged with others in any military operation; that the neighborhood was peaceful and quiet, the house was fastened, and the inmates asleep.

Upon these facts, stated more at large in the bill of exceptions, the counsel for the defendants prayed the court to instruct the jury, that if they found that the said Olney and others were citizens of Rhode Island, and had been in arms as insurgents, as aforesaid, against said State, and, upon the approach of the troops of said State, had fresh

fled from the insurgent camp to Massachusetts, for refuge from the authorities and troops of Rhode Island merely, they were not in the peace of Massachusetts, etc. The court declined so to instruct, but did instruct the jury, that if Rhode Island was in a state of civil war, and said Olney and others stood in the relation contemplated, yet, upon crossing the lines of Massachusetts, they were in the peace of the Commonwealth, and within the protection of her laws, exempt from the pursuit of the authorities and troops of Rhode Island; and that the defendants were criminally responsible for capturing the said Olney and others, within the boundaries of Massachusetts.

The court are of opinion that this instruction was correct. It has been argued that the State of Rhode Island, and the other States, under the circumstances in which she was placed, stood in the relation of foreign sovereign States, one of which was at war, and the other neutral; and we were referred to authorities from the laws of nations, to ascertain their respective rights and duties. It would be dangerous, perhaps impracticable, to adopt this reasoning to its full extent, and carry it out into all its consequences. The relations of the States of the Union to each other are very peculiar, and give rise to questions of great delicacy and difficulty. If the States, and the citizens of States, are to be placed in the relations of belligerents and neutrals, and bound by the laws of nations, then they must have the power of regulating their duties and obligations by negotiations and treaties, and thus be enabled more effectually to provide for the performance of their relative duties, and the security of their respective rights. But the States are expressly prohibited from entering into any treaty, alliance or confederation, or, without the consent of Congress, to enter into any agreement or compact with another State, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. They are, therefore, in the condition of States sovereign to some purposes, but who have by compact renounced and relinquished their sovereign powers, in regard to war and peace, and, of course, to the regulation and control of the incidents to war and peace, except the power of taking warlike measures, strictly and purely defensive, in case of an exigency, which will admit of no delay. In all other respects, the power of making war and peace, of treaties and alliances, is vested absolutely and exclusively in the general government, with their incidents. But as a compensation for this surrender, the general government of the United States is bound to protect each State against invasion, and against domestic violence. The Constitution of the United States is to be taken as a whole; and whilst it restrains the States from making war and peace, and exercising powers incidental thereto, it assumes that the general government will

do its duty, and effectually secure to each State that immunity from all violence, foreign and domestic, which was the obvious consideration for the surrender of these great powers. It is useless to speculate upon the contingency, as to what would be the rights of the States in case the general government should fail to afford that protection to States which the Constitution guarantees to them. Such a state of things is not to be supposed. It would be one of revolution and anarchy, in which a regard to self-defence and public safety would constitute an exigency that would warrant such measures as the necessity of the case might require, under the maxim *salus populi suprema est lex.* The necessity, which would create such an exigency, must limit and direct the means of meeting it.

But supposing, for the purpose of the argument, that the relations of the States to each other were those of sovereign States, in one of which an insurrection against the government existed; we think the instructions given in this case, upon the facts stated in the bill of exceptions, were correct. The exclusive right of every sovereign State to its own territory, and to the regulation and government of it, is absolute and inviolable, and extends to all persons within it. Every person entering the territory owes allegiance to the government, temporary indeed, but absolute. Whilst he continues within it, he is bound, like any other subject, by the laws of the State, owes it obedience, and is liable to the operation of its criminal laws; and as a correlative right, he is regarded as a subject, for the purpose of protection and immunity from arrest, and all forcible invasion of his liberty or property, by any other State, except so far as the exercise of such right by foreign authority is stipulated for, by treaty, amongst sovereign states, or, amongst the States of this Union, by the Constitution of the United States, and the laws and treaties made under it. According to these principles, which seem to us plain and well settled, Olney and the other persons, found at Crooks's tavern in Bellingham, owed allegiance to Massachusetts, whilst they remained within the limits of the State; they were subject to its laws, would have been responsible for any violation of them, and, for the time being, were in the peace of the Commonwealth.

We do not mean to be understood as holding that soldiers and subordinate military officers, who are ordered by their sovereign to enter the territory of another State to pursue an enemy, and for any other purpose, may not rightfully claim impunity from the animadversion of the criminal laws of the country invaded. Such an invasion, however, must be deemed to be made *flagrante bello*, whether war have been declared or not, because it is in itself an act of war. But this could not be justified by an order of the subordinate military

authorities of a State, in the exercise of their ordinary functions in the defence of a State. Nothing but the sovereign power of the State, by a previous order, directing such invasion, or by a subsequent ratification, when done in its name, will warrant such invasion, and excuse the subordinates engaged in it; because it emanates from the sovereign authority having the power to make war. The wrong done by such an invasion then becomes a question of negotiation between sovereigns, and the subordinate agents are entitled to immunity.

The court, in saying that in their judgment the instruction to the jury was correct, in charging them that Olney, Ballou, Whipple and Walker, upon crossing the lines of Massachusetts, were in the peace of the Commonwealth, and within the protection of her laws, against the pursuit of the authorities and troops of Rhode Island, and that the defendants were criminally liable for capturing the said Olney and others, have done so on the facts stated, and in connection with the qualifying instruction given at the same time. It was this: That if there existed a *necessity*, for the defence or protection of the lives and property of the citizens of Rhode Island, or for the defence of the State of Rhode Island, that the defendants should do the acts complained of in the indictment, or if there was probable cause to suppose, at the time, the existence of such a necessity, and the jury found such necessity or probable cause, they were to acquit them. And much evidence was given on both sides upon this question of fact. This instruction gave the defendants the full benefit of any excuse, arising from the use of force in the necessary defence of the State and its citizens, in whose service they were engaged; leaving a great latitude as to the means necessary to such defence. It is not requisite, we think, in the present case, to attempt drawing any exact line of distinction as to the measures which such necessary defence would warrant, nor, perhaps, would it be practicable; because it must depend much on the circumstances of each case. In the present case, it appears that the arrest of Olney and others was made at midnight, in a dwelling-house and common tavern, nearly three miles from the State line, the men not being in arms or in military array, or in such numbers as to be immediately formidable; and it is difficult to perceive how such act could be considered as done in the necessary defence of the territory of Rhode Island. The men had been in arms, and probably had rendered themselves amenable to the laws of Rhode Island; and it might be a prudent precaution, on the part of that State, to discover, pursue and arrest them, as suspicious persons, of which they had no right to complain; and if it could have been done without violating the laws, the peace, or the rights of this

Commonwealth, it would have been quite excusable. But the question was rightly submitted to the jury, as one of strictly necessary defence.

This instruction the court refused to give, but instructed the jury, that in the case supposed, the State of Rhode Island had no such rights as above claimed, within the territory of Massachusetts, to capture her own rebel citizens; and that such captures were unlawful, unless necessary in the defence of the lives and property of the citizens of Rhode Island, at the time; of which necessity, or probable cause, or supposed probable cause, the jury, and not the State of Rhode Island, was the proper judge; and that the orders of the State of Rhode Island could not shield her citizens and soldiers from being criminally responsible in the courts of Massachusetts, for acts done in the territory of Massachusetts, under and in compliance with such orders, in time of civil war and domestic insurrection, and whilst such citizens and soldiers were subject to martial law.

We are of opinion, that the court below decided correctly in refusing to give the instruction prayed for. That instruction assumes matters both as to the relations of the States to each other, and as to the authority under which the acts proposed to be excused or justified were done, and as to the condition of the persons arrested, at the time and place of arrest.

As to the relations in which the States stood to each other, which we have already partly considered: Suppose that the State of Massachusetts was ultimately bound to render aid to Rhode Island against domestic violence; some competent power must judge and decide upon the existence of the *casus fœderis;* and it cannot be possible that Massachusetts, and all the other States in the Union, are to be placed in a state of war, by the sole judgment of the acting government of the State of Rhode Island. It must be authoritatively determined and made known, that domestic violence, and actual insurrection against the government of the State, exist, and that the acting government, resisting such violence and insurrection, by force of arms, is the true and legitimate government of the State, and entitled to the aid and assistance intended to be secured by the Constitution of the United States to the respective States. If the State of Massachusetts retains her sovereign power to this extent, then it is for the government of Massachusetts, by some authentic act, to declare or recognize such state of civil war, and such duty of Massachusetts as an ally; or, if this portion of the sovereignty of the State is delegated to the general government, then it is further to recognize and declare the *casus fœderis*, and by ordering out regular troops, and the ships of war, or by drafts of militia from other States, or otherwise, to direct

the measures to be pursued. If it were true, as claimed by the defendants, that one State is the sole and exclusive judge of the necessity for waging war against its rebel subjects, and thereupon to confer on their troops an authority to make an unlimited use of the territories of all other States, it would be placing such States in a state of war, without their own consent, or the consent of the general government, to whom the power of judging and acting, in the case supposed, has been confided by the Constitution. Such a state of things would tend greatly to destroy the peace, and put at hazard the security, of the States and their citizens. Besides, such a principle, if admitted, would leave neither to the government of the State, the use of whose territory is thus claimed for hostile purposes, nor to the government of the United States, intrusted with that portion of the sovereign power of the States, the power of deciding whether the government of a State, at war with its citizens, is the true and legitimate government, or a mere usurped authority. Such a claim appears to us to be wholly untenable.

But further; the prayer for instruction assumed that the acts done by the defendants, with the armed party accompanying them, who proceeded to Bellingham, entered the house of Crooks, and seized and carried away Olney and others as rebels against the authority of the State of Rhode Island, were done under the sovereign authority of the State, either by a previous order, emanating from the government, or that the acts done in their name were subsequently, in due form, ratified, adopted and expressly sanctioned by the authority of the State of Rhode Island, so as to transfer the responsibility, whatever it was, from the individuals to the State. But so far from this, the case shows that they acted under the authority of an order, given by Major Martin, to do the specific duty, in conformity with a more general direction from the military commanding officer, directing the officers and soldiers to scour the country, to the distance of fifty miles, without regard to State lines, in order to secure the insurgents who had fled. The specific order to cross the lines of Massachusetts did not emanate from the government; it was an ordinary military operation, undertaken by the military officers, in pursuance of their general duty to defend the State against the insurgent forces. And so far from being specifically ratified, sanctioned and adopted, by the State of Rhode Island, the Governor, when applied to for that purpose by the Governor of Massachusetts, declined so to do, but repudiated it, and denied that it was done by authority of the State. And the act, stated in the bill of exceptions, passed by the Legislature of Rhode Island, to indemnify these defendants, against certain expenses occasioned by their prosecution, is far from that express adop-

tion which will secure the citizen by taking the responsibility upon the State.

The other matters assumed in the prayer in question relate to the particular situation of the men at the time, as being captured just over the lines, etc. These are not of much importance, but do not seem to be warranted by the evidence.

And the court are also of opinion, that the instruction actually given, under this prayer, viz., that the acts of the defendants were unlawful, unless done in the necessary defence of the lives and property of the citizens of Rhode Island, or in the necessary defence of the State, was sufficiently favorable to the defendants.

The last prayer for instruction is thus stated: The counsel for the defendants further prayed the court to instruct the jury, that if they found that the said Blodgett and Hendrick were citizens of Rhode Island, actually serving as soldiers in the ranks, with the troops of Rhode Island, under regular military command, in time of civil war and domestic insurrection in said State, and under martial law, and were duly ordered by their lawful military superiors, acting under and by authority of the State of Rhode Island, to cross the lines and arrest, within the territory of Massachusetts, the said Olney, Ballou, Whipple and Walker, rebel citizens of Rhode Island, recently fled to Massachusetts, for refuge merely, from the troops of Rhode Island, they were not personally liable, in the criminal courts of Massachusetts, for executing such orders without excess or unnecessary violence; but that the State of Rhode Island was alone responsible to the State of Massachusetts for the violation of her territorial rights. This instruction the court refused to give, but did instruct the jury that the defendants were personally liable, in the criminal courts of this Commonwealth, for the acts done by them as aforesaid, under the orders of the State of Rhode Island, notwithstanding such orders given, and only by them faithfully executed.

Upon this ground, the main argument, in justification or excuse of the defendants, has been placed. We are to presume that the instructions and directions asked for were so asked for in reference to the case stated in the bill of exceptions, and not as mere abstract propositions; and, as such, their correctness in point of law, and their adaptation to the case on trial, are to be considered. It was then a request to the judge to instruct the jury that if the ordinary military officers of a State, in the exercise of the military powers vested in them for the defence and protection of the State against an insurrection, after martial law declared by the Legislature, should order subordinate officers and soldiers to enter a neutral territory, the territory of another State, to arrest and secure the persons of rebel citi-

zens, recently in arms, the persons thus ordered, being bound to obey, under the penalties of disobedience of a military command which they have no means of resisting, would not subject themselves to the animadversion of the criminal laws of the State whose territory is thus violated. This proposition, we think, cannot be maintained upon any well-recognized principle of public law. It would be an authority to every military officer, superior or subordinate, by means of orders to those under him, in all cases where military forces are raised and organized, to extend hostilities indefinitely into the territories of neutral and independent States, to the imminent danger of the lives, property and possessions of the subjects of such neutral State; and the only remedy for the injured party would be by way of remonstrance to the government of the party doing such wrong. But, surely, this is not one of the ordinary or incidental powers conferred upon military officers by their own government. They are indeed to defend the territory and the just rights of their States by warlike measures; but these must be taken in reference to the just rights and limited powers of the State itself, under whose authority they act, and they cannot, by force of such authority, commit hostile acts against independent States, with whom their own State is at peace. If such military entry into the territory of a neutral State is supposed necessary, such act is a high prerogative of sovereignty, and the necessity of it must be judged of, and the warrant for it must be given by the express command or direction of the sovereign authority. Any other principle would make the peace of any State depend upon the judgment and discretion, or even the rash and ill-judged act, of every military officer, in time of war.

It has been argued upon the ground that men ought not to be held responsible for acts done in obedience to orders which they are compelled to obey, under severe military discipline. But this is not the true principle; and it would be dangerous in the extreme to carry it out into its consequences. The more general and the sounder rule is, that he who does acts injurious to the rights of others can excuse himself, as against the party injured, by pleading the *lawful* commands only of a superior, whom he is bound to obey. A man may be often so placed in civil life, and more especially in military life, as to be obliged to execute unlawful commands, on pain of severe penal consequences. As against the party giving such command, he will be justified; *in foro conscientiæ* he may be excusable; but towards the party injured, the act is done at his own peril, and he must stand responsible.

Had the government of Rhode Island ordered the expedition into Massachusetts, it would have presented the question argued in the

present case, viz., whether the men would have been protected by such order, and the State alone be responsible. War may be made without being declared; and when it is so made and recognized by the governments of the respective parties, then the rights belonging to belligerents, and incident to war, attach to the States and their respective citizens and subjects, in arms or otherwise. The argument in excuse of the defendants, to be effectual, must be put upon the ground, and go to the extent, that in the actual state of things, there was war *de facto*, between Rhode Island and Massachusetts. But this is too extravagant a view to be taken by any aspect in which, upon the facts, the case can be placed. These facts show that the proceeding of Blodgett and others, in passing over the lines of Massachusetts, and doing the acts which are the subject of this prosecution, though ordered by Major Martin, acting under the general authority of Major-General McNeill, was not the act of the State of Rhode Island, either by previous special authority, or subsequent ratification or adoption. The authority of the commanding and other military officers is *prima facie* limited to the defence of the territory and territorial rights of the State appointing them, and must stand so limited, unless it is shown that an authority was specially vested in them by the State, to enter the territory of another State. In the present case, if the act itself was equivocal, it was put beyond doubt, by the answer and denial of the Governor of Rhode Island, that the act was not authorized or adopted as the act of the State. The acts of the defendants then, being plainly a violation of the rights and laws of Massachusetts, and of the legal rights of persons lawfully within its protection, and being denied and repudiated as an act of the State of Rhode Island, it follows, as a necessary legal consequence, that it was a lawless and unjustifiable act of violence on the part of the defendants, subjecting them, and all who assisted them, to be punished for such violation, by our laws.

If these States had stood in the relation, in all respects, of foreign states (which is the supposition in the argument, and the one, perhaps, most favorable to the defendants), we do not see how they could make out their justification, since the executive of Rhode Island has repudiated the act as an act of the State.

Whether, if the measure of sending a military force into Massachusetts, being in its nature an act of war, would have justified, and rendered the persons sent free from punishment, the facts of this case do not require us to consider. It would depend upon questions arising out of the peculiar relations in which the States stand to each other and to the general government. The Constitution of the United States still recognizes that qualified sovereignty of a State, so far as

to raise military forces for their own protection and defence, against both foreign invasion and domestic insurrection. The first security of a State against violence is to be sought in the duty imposed on the United States Government, to take order in that respect. If, for any cause and by any means, imperious necessity or otherwise, that fails, and the State in which insurrection arises is left to take care of its own defence, it may be a grave question, whether such State would not be remitted to its natural and original rights of sovereignty, with its recognized incidents, to the extent necessary to meet that exigency, and for that purpose to issue the necessary declarations, enter into stipulations with other States, and the like. But even in that case, soldiers and others, acting in the defence of such a State, could have no higher rights, no higher claim of impunity for acts done to the injury of others, than the citizens and subjects of a sovereign and independent State, acting under like circumstances.

On the whole, the court are of opinion that the instructions were correct and carefully considered, as well as the refusal of instructions prayed for, and therefore that the exceptions must be overruled.[1]

[1] The case of the *Caroline* (the vessel referred to in notice of McLeod's case as given in *Underhill* v. *Hernandez*, *ante*, 67) is the one generally referred to for the doctrine that the violation of foreign territory may be justified on the ground of the necessity of self-defence (1 Wharton's Digest, § 50 *c*). Perhaps the most satisfactory as well as final judicial account of the McLeod and *Caroline* episodes is to be found in the Decisions of the Commission of Claims under Convention between U. S. and Gt. Br., Feb. 8, 1853, at pp. 314–327. The statements of the various transactions attending the different phases of the cases are here quoted from p. 314 of the report:

"Where a citizen of Canada was arrested in the State of New York, for a criminal offence against the laws of the State, arising from his being engaged in the destruction of the steamer *Caroline*, in New York, with a party from Canada, during an insurrection in that province, and Great Britain demanded his release on the ground that the acts complained of were done by the orders of that government, and that the nation was responsible and not the individual; and where the difficulties arising from these causes were afterwards adjusted between the two governments, held that such adjustment barred all claims of citizens of either country against the other for individual damage sustained, and that such cases were not within the provisions for the settlement 'of outstanding claims,' under the convention of February 8, 1853.

"Where a citizen of another government was arrested in this country for a criminal offence and claimed his discharge on the ground that the acts complained of were done under the authority of his government, it does not necessarily entitle him to a release. Time must be had for the action of the proper tribunals on such plea, and the ultimate decision of a court in the last resort, where the same becomes necessary.

"Neither does any claim for damage arise where the means provided by law for the adjustment of such questions are less speedy than would be desirable, and may require amendment, or error has arisen, in courts of subordinate jurisdiction, from which appeal might have been taken or correction had.

"Alexander McLeod, a British subject resident in Canada, was arrested in Lewistown, in the State of New York, in November, 1840, on a charge of being concerned

Section 16. — Injury to Foreigners by Mob Violence.

THE CITY OF NEW ORLEANS v. ABBAGNATO.

United States Circuit Court of Appeals, Fifth Circuit, 1894.

(62 *Federal Reporter*, 240.)

Pardee, Circuit Judge. The treaty between the kingdom of Italy and the United States proclaimed Nov. 23, 1871, guarantees to the

in the seizure and destruction of the steamer *Caroline*, attended with loss of life, in the State of New York, on the 29th of December, 1837.

"During the pendency of the prosecution, Great Britain notified the government of the United States that the seizure of the *Caroline* was made under the authority of Great Britain, and claimed the discharge of McLeod on that ground. He was not discharged, but was tried and acquitted, and now brings his claim before this commission for damages and expenses arising from his detention and trial."

Further instances are: the seizure of Saint Marks (1 Wharton's Digest, 224) holding that necessity justifies an invasion of foreign territory so as to subdue an expected assailant, and the seizure of Amelia Island, in 1817 (1 Wharton's Digest, § 50 *a*). In the technical language of private as distinguished from public law, these transactions amounted to the abatement of a nuisance, the right to do which exists in the aggrieved party. Its exercise, however, is decidedly hazardous (3 Black. Com. 5 and Pollock's Torts, 8th ed. p. 404).

These instances were on land: the case of the *Virginius* was on the high seas.

The *Virginius* was registered in the United States and carried the American flag; but, as it eventually appeared, she was really the property of certain Cuban insurgents, and was employed in aid of the rebellion in Cuba. On the 9th of July, 1873, she arrived at Kingston, Jamaica, and on the 23d of October she cleared ostensibly for Limon Bay in Costa Rica, but really for the coast of Cuba. Being chased by a Spanish warship, she put into Port-au-Prince, Hayti. Thence she proceeded again to the coast of Cuba, and was again chased by a Spanish war vessel, the *Tornado*, and was captured ten or fifteen miles from the coast of Jamaica, on the 31st of October. She was taken to Santiago de Cuba, where a court was assembled for the trial of the persons found on board — 155 in number. Of these four were tried on the 3d of November, and shot on the 4th, thirty-seven on the 7th, and sixteen on the 8th. Among those executed were nine Americans and sixteen British subjects.

The government of the United States, supposing that its rights on the high seas had been violated, demanded reparation. And by an agreement of the 29th of November, Spain stipulated to restore the *Virginius* and the survivors of the passengers and crew, and to salute the flag of the United States on the 25th of December following, unless Spain should in the mean time prove that the vessel was not entitled to carry said flag. The matter was submitted to the Attorney-General of the United States, who, after careful examination, reported on the 12th of December that the registry of the *Virginius* was fraudulent, and that she had therefore no right to carry the American flag. But he added, "I am also of opinion that she was as much exempt

citizens of either nation in the territory of the other "the most constant protection and security for their persons and property," and further provides that "they shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed upon the natives."

from interference on the high seas by any other power, on that ground, as though she had been lawfully registered. Spain, no doubt, has a right to capture a vessel, with an American register, and carrying the American flag, found in her own waters assisting, or endeavoring to assist, the insurrection in Cuba, but she has no right to capture such a vessel on the high seas upon an apprehension that, in violation of the neutrality or navigation laws of the United States, she was on her way to assist said rebellion. Spain may defend her territory and people from the hostile attacks of what is, or appears to be, an American vessel; but she has no jurisdiction whatever over the question as to whether or not such vessel is on the high seas in violation of any law of the United States." Spain having proved her point, the salute to the flag was dispensed with. The vessel was delivered to the United States authorities on the 16th of December, 1873; but on her way north, sank, off Cape Fear, on the 26th of that month.

Both the United States and England demanded reparation for the persons of their respective nationalities who had been executed by the captors of the *Virginius*: and this Spain eventually agreed to make. Even assuming that the vessel was lawfully seized, it was contended that there could be no justification of the summary execution of foreigners by order of a drum-head court-martial.

The position of the Attorney-General, that Spain had no right to capture such a vessel on the high seas, etc., has called forth much adverse criticism. Both Woolsey and Dana justified the capture at the time. "The register of a foreign nation," said Dana, "is not, and by the law of nations is not recognized as being, a national voucher and guaranty of national character to all the world, and nations having cause to arrest a vessel, would go behind such a document to ascertain the jurisdictional fact which gives character to the document, and not the document to the fact." It was the duty of the Spanish captain, says Woolsey, to defend the coasts of Cuba against a vessel which was known to be under the control of the insurgents, for which he had been on the lookout, and against which the only effectual security was capture on the high seas. Woolsey's International Law, 6th ed., pp. 368, 369.

In a pamphlet on the "Case of the *Virginius*," Mr. George T. Curtis took similar ground. "We rest the seizure of this vessel," he says, "on the great right of self-defence, which, springing from the law of nature, is as thoroughly incorporated into the law of nations as any right can be. No state of belligerency is needful to bring the right of self-defence into operation. It existed at all times — in peace as well as in war. The only questions that can arise about it relate to the modes and places of its exercise."

See, also, on the question of self-defence, Great Britain's seizure of Danish Fleet in 1807, Hall's Int. Law, 285.

The right to visit and search foreign merchant vessels upon the high seas does not exist in time of peace, other than as the result of treaty stipulation. It is essentially a war power and its exercise is rightly incident thereto, *infra*, § 47.

Unrecognized insurgents have been and are by a rigid adherence to the traditional law of nations held and punished as political pirates — subject to universal capture, and the right of visit and search is necessarily included, indeed it is preliminary to seizure. In this case, therefore, the *Virginius* was rightly captured by the Spanish authorities, provided it was, and such was the fact, in the employ of the Cuban insur-

Treaty of 1871, Art. 3 (17 Stat. 845). This treaty applies to this case only so far as to require that the rights of the plaintiff shall be adjudicated and determined exactly the same as if she were, and her deceased son had been, a native citizen of the United States.

The Constitution of the State of Louisiana provides as follows:

"The citizens of the City of New Orleans or any political corporation which may be created within its limits shall have the right of appointing the several public officers necessary for the administration of the police of said city, and pursuant to the mode of election which shall be provided by the General Assembly." Const. La. 1879, Art. 253.

"The maintenance and support of persons confined in the parish of Orleans upon charges or conviction for criminal offences shall be under the control of the City of New Orleans." Id. Art. 147.

The charter of the City of New Orleans —

"Creates all the inhabitants of the parish of Orleans, as now bounded by * * *, as a body corporate, and establishes them as a political corporation by the name of the 'City of New Orleans,' with the following powers, and no more: It shall have a seal and may sue and be sued. * * * (Section 1.) The council shall have power, and it shall be their duty, to pass such ordinances, and to see to their faithful execution, as may be necessary and proper to preserve the peace and good order of the city; * * * to organize and provide an efficient police. * * * (Section 7.) The council shall also have power * * * to establish jails, houses of refuge and reformation and correction, and make regulations for their government, and to exercise a general police power in the City of New Orleans. (Section 8.) The Mayor shall keep his office at the city hall; * * * shall see that the laws and ordinances within the limits of the City of New Orleans be properly executed; * * * shall be ex-officio justice and conservator of the peace. * * * (Section 19.)" Acts 1882, No. 20, p. 14.

The act of the Legislature of Louisiana (passed in 1888) creating the police board of the City of New Orleans preserves to the Mayor of the City of New Orleans the power, as the commander in chief of the police force, to issue such orders as may be necessary and proper for the preservation of the peace in the City of New Orleans, and in said act it was declared that:

"It is hereby made the duty of the police force at all times of the

gents. The justification is therefore twofold: piracy and self-defence, which latter, if it exists at all, exists as well on sea as on land.

See: *The Nereide*, 1815, 9 Cr. 388, 427-428; *The Marianna Flora*, 1826, 11 Wheat. 1; *U. S.* v. *Ambrose Light*, 1885, 25 Fed. 408, *infra*.

No defence or justification is offered for the summary execution of the inmates of the *Virginius;* that is a matter within the peculiar province of the Spanish publicist. — Ed.

day and night, and the members of such force are thereunto empowered, to especially preserve the public peace, to prevent crimes, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages which obstruct the free passage of public streets, sidewalks, squares and places, protect the rights of persons and property," &c. Acts 1888, No. 63, p. 64.

The city of New Orleans, by her pleadings, admits the gross negligence charged in the petition in the performance of the duties devolving upon the municipality under the Constitution and laws of the State above referred to, whereby Abbagnato lost his life at the hands of a mob while in the custody of the law; and the question presented in this case is whether, on such admission of facts, the city can be held liable in damages. It is well settled that at common law no civil action lies for injury to a person which results in his death. *Insurance Co.* v. *Brame*, 95 U. S. 754-756; *Dennick* v. *Railroad Co.* 103 U. S. 11, 21; *The Harrisburg*, 119 U. S. 199-214, 7 Sup. Ct. 140. The rule is the same under the civil law, according to the decisions of the Louisiana Supreme Court. *Hubgh* v. *Railroad Co.*, 6 La. Ann. 495; *Hermann* v. *Railroad Co.*, 11 La. Ann. 5. In the absence of a statute giving a remedy, public or municipal corporations are under no liability to pay for the property of individuals destroyed by mobs or riotous assemblages. Add. Torts, 1305; Dill. Mun. Corp. § 959.

In the case of *State* v. *Mayor, etc., of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, the Supreme Court of the United States held that the right to demand reimbursement from a municipal corporation for damages caused by a mob is not founded on contract. It is a statutory right, and may be given or taken away at pleasure. In the same case, Mr. Justice Bradley, concurring said:

"I concur in the judgment of this case, on the special ground that remedies against municipal bodies for damages caused by mobs or other violators of law, unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. In giving or withholding remedies of this kind, it is simply a question whether the public shall or shall not indemnify those who sustain losses from the unlawful acts or combinations of individuals; and whether it shall or shall not do so is a matter of legislative discretion, just as it is whether the public shall or shall not indemnify those who suffer losses at the hands of a public enemy, or from intestine commotions or rebellion."

If this be the rule with regard to the liability of municipal corporations for damages to property committed by mobs or riotous assem-

blages, *a fortiori* it must be the rule with regard to the liability of municipal corporations for damages resulting in the loss of life from the acts of mobs or riotous assemblages. The reason of the rule is obvious. Actions to recover from municipal corporations damages resulting from the acts of mobs and riotous assemblages are actions to hold such corporations liable in damages for a failure to preserve the public peace. The preservation of the public peace primarily devolves upon the sovereign. Under our system of government the State is that sovereign. *U. S.* v. *Cruikshank*, 92 U. S. 542–553; *Western College* v. *City of Cleveland*, 12 Ohio St. 377. When, by the action of the State, a municipal corporation is charged with the preservation of the peace, and empowered to appoint police boards and other agencies to that end, the corporation *pro tanto* is charged with governmental functions in the public interest and for public purposes, and is entitled to the same immunity as the sovereign granting the power for negligence in preserving the public peace, unless such liability is expressly declared by the sovereign. This proposition is so well recognized that not a well-considered, adjudicated case can be found in the books where, in the absence of an express statute, any municipality has been held liable for the neglect of its officers to preserve the peace. In the case of *Western College* v. *City of Cleveland, supra*, it was said:

"It is the duty of the State government to secure to the citizens of the State the peaceful enjoyment of their property and its protection from wrongful and violent acts. For the proper discharge of this duty, power is delegated in different modes. One of these is the establishment of municipal corporations. Powers and privileges are also conferred upon municipal corporations to be exercised for the benefit of the individuals of whom such corporations are composed, and, in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property when they are to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the property comprised within the limits of the corporation and its adaptation for the purposes of residence and business. As to the first, the municipal corporation represents the State; as to the second, the municipal corporation represents the pecuniary and proprietary interest of the individuals. As to the first, responsibility for acts done or omitted is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable."

The exemption of municipalities from liability to suits for damages

for the negligence of officers and agents in the execution of the governmental functions granted by the State, in the public interest, and in the absence of statutory liability, is recognized in Louisiana, as shown by the decisions of the Supreme Court of the State in *Egerton* v. *Third Municipality*, 1 La. Ann. 437; *Stewart* v. *City of New Orleans*, 9 La. Ann. 461; *Lewis* v. *New Orleans*, 12 La. Ann. 190; *Bennett* v. *New Orleans*, 14 La. Ann. 120; *Howe* v. *New Orleans*, 12 La. Ann. 482; *New Orleans, etc., R. Co.* v. *New Orleans*, 26 La. Ann. 478, — although *Johnson* v. *Municipality No.* 1, 5 La. Ann. 100, *Clague* v. *New Orleans*, 13 La. Ann. 275, and *Chase* v. *Mayor*, 9. La. 343, are apparently to the contrary. The Louisiana cases, as well as those of other States, are very ably reviewed, and the whole matter discussed, in a well-considered opinion of the learned judge of the eastern district of Louisiana in the case of *Gianfortone* v. *City of New Orleans* (recently decided), 61 Fed. 64. It follows, therefore, that in order to recover damages against the city of New Orleans for the taking of human life by a mob in said city, no matter what the negligence of the city officials may have been, there must be a statute of the State of Louisiana expressly or by necessary implication giving a remedy in such cases.

Section 2453 of the Revised Statutes of Louisiana reads as follows:

"The different municipal corporations in this State shall be liable for the damages done to property by mobs or riotous assemblages in their respective limits."

And Article 2315, Rev. Civ. Code, as last amended, reads as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father or mother, or either of them for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife, as the case may be."

Article 2316, id., reads as follows:

"Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence or his want of skill."

And Article 2317:

"We are responsible not only for the damage caused by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

It is not seriously contended in this case that Article 2453 of the

Revised Statutes of the State warrants the maintenance of the present suit, or fixes any liability upon the City of New Orleans because of the death of Abbagnato at the hands of a mob, as recited in the petition. As we consider the statute and the fact of its existence on the statute book, it goes rather to deny the right to recover in this case than to support it, for it shows clearly that in the legislative mind the statute was necessary to fix liability upon municipal corporations for damages to property done by mobs; and the limitation of the right to recover damages to property only shows a clear legislative intent that beyond property, and for life or limb, municipal corporations should not be responsible. The entire right of the plaintiff in error to recover damages must then be based upon Article 2315 and the subsequent articles of the Civil Code, above quoted. Article 2315, as originally adopted, was as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

It was under this article that the decision in *Hubgh* v. *Railroad Co.*, *supra*, was rendered, holding that an action for damages caused by the homicide of a free human being cannot be maintained. In regard to the article the court says:

"The provisions of this article, however general and comprehensive its terms may be, are found more than once recited in terms equally general and comprehensive in the laws of the 15th title of the 7th Partida. The article was inserted in the Code of 1809, at a time when the Spanish laws were in force. It was put and retained to this time in the Code, not for the purpose of making any change in the law, but because it was a principle which was in its proper place in a Code; a principle which would be equally recognized as a necessary conservative element of society, and equally obligatory, whether it was formally enacted in a Code or not. * * * Merlin, in giving his conclusions before the Court of Cassation, in the Case of Michel, Reynier *et al.*, respecting the Article 1382 of the Code Napoleon, which is identical with the Article 2294 of our Code, says: 'The principle laid down in Article 1382 is not new. It is drawn from the natural law; and, long before the Napoleon Code, the Roman laws had solemnly proclaimed it. Long before that Code, the French laws had recognized and assumed its existence.'"

We understand from this that the article of the Civil Code in question was not an innovation of the civil law, in force in the State, introducing new principles and establishing new duties and responsibilities which did not before exist. It is a part of a system of laws, and controlling only where, under general principles, it is applicable to the facts and liabilities of a particular case. We have shown that the article

was not enforceable when the "act whatever of man" resulted in death, until the statute so declared, and this because of the intervention of other equally well-recognized principles of law. To make it applicable in case of death through negligence, the Legislature of 1855 amended the article by adding thereto as follows:

"The right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father and mother or either of them for the space of one year from the death." Acts 1855, No. 223, p. 270.

As thus amended, the scope of the article was still too narrow to permit the recovery of other damages than such as the deceased himself would have had had he survived the injury (*Vredenburg* v. *Behan*, 33 La. Ann. 627); and therefore the article was again amended and reenacted, adding thereunto as follows:

"The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife, as the case may be." Acts 1884, p. 94.

Neither the amendment of 1855 nor that of 1884 enlarges the scope of the article as to the persons who may be held liable for negligence. The amendments go no further than to provide for a limited survival of the action and an enlarged rule of damages. The article is applicable now to the same persons, and to no others, as before amendment; and if, before amendment, it could not be applied so as to hold a municipal corporation liable for damages resulting from the acts of mobs and riotous assemblages, it cannot be so applied now. Before this amendment, it declared well-known principles of the civil law, but not all of them, and it controlled in cases where the application of other well-known rules and principles did not deny the action or defeat recovery. As amended, it should have the same construction and be given the same force. Before the act of 1855, it was not contended, nor could it have been successfully contended, that the article was applicable as against a municipal corporation to recover damages to either person, life, or property resulting from the acts of mobs and riotous assemblages. For these reasons, we are clear that neither expressly nor by implication does it now give a remedy in damages against a municipal corporation for negligence in preserving the public peace resulting in the loss of life by the acts of a mob. As we find no law of the State of Louisiana giving a remedy in damages against a municipal corporation for the acts done by a mob resulting in the loss of human life, we are compelled to reverse the judgment of the court below.

The judgment of the circuit court is reversed, and the case is re-

manded, with instructions to maintain the exception of non-liability, and dismiss the plaintiff's petition.[1]

[1] The questions growing out of the New Orleans affair, in 1891, present some peculiar features; and forcibly illustrate certain defects, as regards the conduct of foreign relations, in the federal system of the United States.

The Chief of Police of New Orleans had been assassinated in a most dastardly manner; and strong suspicions of complicity in the murder rested on the members of an Italian society called the "Mafia." A number of Italians were finally arrested and put upon their trial, but in the end were acquitted by the jury. Believing that the jury had been tampered with, and that there was, in this case, a signal failure of justice, a public indignation meeting was held, which was attended by the better class of citizens; inflammatory addresses were made, and measures apparently adopted to take the matter out of the hands of the court. Accordingly, a mob assembled the next morning, and, as it would appear, without any protest from State or city governments, broke open the jail where the accused were still incarcerated, and shot or hanged a number of the suspected Italians. Among this number were several who were not naturalized, and were, therefore, still citizens of Italy.

The President, by the Secretary of State, expressed regret for the occurrence and declared his purpose to lay the matter before Congress at its next session, and to recommend that an indemnity be granted to the families of the murdered men.

The Italian Government was not satisfied with this position of the United States, but demanded further that the leaders of the mob be criminally prosecuted and punished according to law.

With this demand the Government of the United States could not comply, however willing it might be to do so. It is well known that the federal courts have no common-law jurisdiction in criminal matters; it was impossible, therefore, to institute a criminal suit against these persons in those courts; and as the States are wholly independent of the Federal Government in respect of such jurisdiction, it was equally impossible to compel the government of the State of Louisiana to institute such proceedings. The government of the United States was therefore quite helpless in this aspect of the case, and could only listen to the complaints of Italy, and try to explain to her statesmen the intricacies of the United States Constitution.

It is undoubtedly within the competence of Congress to confer upon the federal courts jurisdiction in this class of cases; but as yet it has not been done.

In regard to the merits of this case, it would seem that the United States should accept the responsibility, as in fact they have done, for the acts of the mob. In the first place, these persons were in the custody of the State government and, for the purposes of international law, in that of the national government, — and therefore entitled to special protection. In the second place, there was no serious attempt on the part of the proper authorities to quell the riot; and it is generally understood that a government is liable internationally for injuries done to "alien residents by a mob which by due diligence it could have suppressed."

The Italian Government eventually withdrew the demand for the punishment of the actors in the affair, and accepted a money indemnity instead.

For other cases under the subject of this section, see 1 Wharton's Digest, 473, 482–486; Calvo: Droit International, 5th ed., Vol. III., 142–156. And see the case of *Don Pacifico, infra*, section 26, in which the claim for damages was enforced against Greece, on the ground that it was impossible to obtain justice through the ordinary channels — the courts. And on the constitutional difficulty, see an excellent article

CHAPTER III.

JURISDICTION ON THE HIGH SEAS.

Section 17. — Merchant Vessels.

WILSON *v.* McNAMEE.

Supreme Court of the United States, 1880.

(102 *United States*, 572.)

Mr. Justice Swayne delivered the opinion of the court.

The only point argued here was the validity of the pilot law of New York with reference to the Constitution of the United States.

At the close of the opening argument of the learned counsel for the plaintiff in error, we announced that the affirmative of the question thus presented was so well settled by the repeated adjudications of this court, that we had no desire to hear the counsel for the defendant in error upon the subject.

Thereafter, the counsel who had been heard submitted a memorandum, in which he called our attention particularly "to the tenth point of the brief of the plaintiff in error, namely, that the tender took place outside of the jurisdiction of the State of New York." He added: "This question has never yet been passed upon by this court in either of the other pilot cases."

Our opinion will be confined to that subject.

There are several answers to the suggestion.

by M. Despagnet: Les Difficultés Internationales venant de la Constitution de certains Pays. 2 R. G. D. I., 184–199.

The foreign sojourner is entitled to an equal, not greater, protection than the native resident. When, therefore, through civil war or mob violence which the authorities cannot control, aliens suffer injury, the state is not responsible to the aliens for injuries thus received. *New Orleans Riot*, 1851, 2 Wharton's Digest, 600.

For the seizure of an American steamer within the territorial waters of Colombia, see *Montijo's Case*, 1876, 2 Moore's International Arbitrations, 1421–1447. On the subject of this note, see generally 1 Butler, Treaty-making Power, 149–166.— Ed.

1. The objection does not appear to have been taken in the circuit court, and cannot, therefore, be considered here. *Edwards* v. *Elliott*, 21 Wall. 532.

2. A vessel at sea is considered as a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality. All on board are endowed and subject accordingly. The pilot, upon his boat, had the same authority from the laws of New York to tender and demand employment, and the same legal consequences, under the circumstances, followed the refusal of the master as if both vessels had then been *infra fauces terræ*, where the municipal jurisdiction of the State was complete and exclusive. The jurisdiction of the local sovereign over a vessel, and over those belonging to her, in the home port and abroad on the sea, is, according to the law of nations, the same. Dana's Wheaton, p. 169, § 106; 1 Kent, Com. 27; Vattel, bk. 1, ch. 19, § 216; 2 Rutherford's Inst., bk. 2, ch. 9, §§ 8, 19.

The principle here recognized is, of course, subject to the paramount authority of the Constitution and laws of the United States over the foreign and interstate commerce of the country, and the commercial marine of the country engaged in such commerce, and subject also to the like power of Congress "to define and punish piracies and felonies committed on the high seas and offences against the law of nations." See *Ex parte McNiel*, 13 Wall. 236.

Speaking of the universal law of reason, justice, and conscience, of which the law of nations is necessarily a part, Cicero said: "Nor is it one thing at Rome and another at Athens, one now and another in future, but among all nations it is, and in all time will be, eternally and immutably the same." Lactantius Inst. Div., bk. 7, ch. 8.

3. Conceding that the pilot laws of the several States are regulations of commerce, Mr. Justice Story said, "They have been *adopted* by Congress, and without question are controllable by it." 2 Story, Const. § 1071.

Mr. Chief Justice Marshall, in *Gibbons* v. *Ogden*, said: "When the government of the Union was brought into existence, it found a system for the regulation of pilots in force in every State. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress." 9 Wheat. 1, 207. The long-continued silence of Congress, with its plenary power, in the presence of such legislation by the States concerned, is itself an implied ratification and adoption, and is equivalent in its consequences to an express declaration to that effect. *Atkins* v. *The Disintegrating Company*, 18 Wall. 272.

The several acts of Congress bearing on the subject are fully referred

to in *Ex parte McNiel*, *supra*. In that, and in the earlier and more elaborate case of *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299, this subject, in all its aspects, was so fully considered that further remarks on the present occasion are deemed unnecessary.

Judgment affirmed.[1]

REGINA v. ANDERSON.

COURT FOR CROWN CASE RESERVED, 1868.

(11 *Cox C. C.* 198.)

Case reserved by Byles, J., at the October Sessions of the Central Criminal Court, 1868, for the opinion of this court.

James Anderson, an American citizen, was indicted for murder on board a vessel, belonging to the port of Yarmouth in Nova Scotia.

[1] In *Crapo* v. *Kelly*, 1872, 16 Wall. 610, 623, the court said:

"The question then arises, while thus upon the high seas was she in law within the territory of Massachusetts. If she was, the insolvent title will prevail.

"It is not perceived that this vessel can be said to be upon United States territory, or within United States jurisdiction, or subject to the laws of the United States regulating the transfer of property, if such laws there may be. Except for the purposes and to the extent to which these attributes have been transferred to the United States, the State of Massachusetts possesses all the rights and powers of a sovereign State. By her own consent, as found in Article 1 of the Constitution of the United States, she has abandoned her right to wage war, to coin money, to make treaties, and to do certain other acts therein mentioned. None of the subjects there mentioned affect the question before us. The third article of that instrument extends the judicial power of the United States 'to all cases of admiralty and maritime jurisdiction.' This gives the power to the courts of the United States to try those cases in which are involved questions arising out of maritime affairs, and of crimes committed on the high seas. To bring a transaction within that jurisdiction, it must be not simply a transaction which occurred at sea, as the making of a contract, but one in which the question itself is of a maritime nature, or arises out of a maritime affair, or it must be a tort or crime committed on the high seas. Over such cases the United States courts have jurisdiction; that is, they are authorized to hear and determine them. No rule of property is thereby established. This remains as it would have been had no such authority been given to the United States court.

"To Congress is also given power 'to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.' It will scarcely be claimed that the title to property could be affected by this provision. Nor does the circumstance that the *Arctic* sailed under the flag of the United States and was entitled to the protection of that government against insult or injury from the citizens or ships of other nations, touch the present point. None of these instances are like that of the passage of a bankrupt law by the United States, which acts directly upon the property of all the citizens of all the States, wherever it may be. Had the claim

She was registered in London, and was sailing under the British flag.

of either party to this vessel been based upon a proceeding under that statute, the title would have been complete, if the property had been within the territory or jurisdiction of any of the States of the Union.

"It is not perceived, therefore, that the relation of Massachusetts to the Union has any effect upon the title to this vessel. It stands as if that State were an independent sovereign State, unconnected with the other States of the Union. The question is the same as if this assignment had been made in London by a British insolvent court, adjudicating upon the affairs of a British subject.

"We are of the opinion, for the purpose we are considering, that the ship *Arctic* was a portion of the territory of Massachusetts, and the assignment by the insolvent court of that State passed the title to her, in the same manner and with the like effect as if she had been physically within the bounds of that State when the assignment was executed."

In *McDonald* v. *Mallory*, 1879, 77 N. Y. 546, 553, 556, it is said: "In respect to crimes committed on the high seas, the power to provide for their punishment has been delegated to the Federal Government, and for that reason State laws cannot be applicable to them; but I cannot escape the conclusion that under the principle of the case of *Crapo* v. *Kelly* civil rights of action, for matters occurring at sea on board of a vessel belong to one of the States of the Union must depend upon the laws of that State, unless they arise out of some matter over which jurisdiction has been vested in and exercised by the government of the United States, or over which the State has transferred its rights of sovereignty to the United States; and that to this extent the vessel must be regarded as part of the territory of the State, while in respect to her relations with foreign governments, crimes committed on board of her, and all other matters over which jurisdiction is vested in the Federal Government, she must be regarded as part of the territory of the United States and subject to the laws thereof." . . . "There is nothing in the nature of this action which renders it exclusively the subject of Federal cognizance. The jurisdiction of the States and of the United States in the matter of personal torts committed at sea, such as assaults by a master on his crew, injuries to passengers, and the like, are concurrent, though remedies by proceedings *in rem* can be administered only by the courts of admiralty of the United States. The field of legislation in respect to cases like the present one has not been occupied by the general government and is therefore open to the States. *Steamboat Co.* v. *Chase*, 16 Wall. 522, 530, 533. Indeed the United States Court of Admiralty would have no jurisdiction in such a case. *Steamboat Co.* v. *Chase*, 16 Wall. 522, 530, 533; *Sherlock* v. *Allen*, 93 U. S. 99, and there is no greater objection to extending the operation of a statute of this description to a vessel at sea than there was to giving similar operation to a State insolvent law."

Dr. Wharton (Commentaries on American Law, 1884, § 308) says: "A ship at sea is, by the prevalent opinion, a part of the territory of the State whose flag she bears, and is consequently governed by the laws of such State. As between the several States of the American Union, a ship is governed by the law of the State in which she is registered. A ship in port, however, is governed by port law, though this does not apply to ships of war." For ships of war, see *Exchange* v. *McFaddon*, 1812, 7 Cr. 116, *ante*.

In *The Lamington*, 1898, 87 Fed. 752, Thomas, J., said: "The first question is this: Did the accident occur on British territory? Every vessel outside the jurisdiction of a foreign power is a detached, floating portion of the territory of the country whose

At the time of the offence committed the vessel was in the river Garonne, within the boundaries of the French empire, on her way up to Bordeaux, which city is by the course of the river about ninety miles from the open sea. The vessel had proceeded about half-way up the river, and was at the time of the offence about three hundred yards from the nearest shore, the river at that place being about half a mile wide.

The tide flows up to the place and beyond it.

No evidence was given whether the place was or was not within the limits of the port of Bordeaux.

It was objected for the prisoner that the offence having been committed within the empire of France, the vessel being a colonial vessel, and the prisoner an American citizen, the court had no jurisdiction to try him.

I expressed an opinion unfavorable to the objection, but agreed to grant a case for the opinion of this court.

The prisoner was convicted of manslaughter.

J. Barnard Byles.

Bovill, C. J.[1] There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was therefore subject to the laws of France, which the local authorities of that realm might have enforced if so minded; but at the time, in point of law, the offence was also committed within British ter-

flag it flies, and under whose laws it is registered. *The Scotia*, 14 Wall. 170, 184; *Crapo* v. *Kelly*, 16 Wall. 610, 624; *Wilson* v. *McNamee*, 102 U. S. 572, 574; *In re Moncan*, 14 Fed. 44; *In re Ah Sing*, 13 Fed. 286; *U. S.* v. *Bennett*, 3 Hughes, 466, Fed. Cas. No. 14,574; *McDonald* v. *Mallory*, 77 N. Y. 546, 551, 553; Wheat. Int. Law (Dana's ed.) § 106; 3 Whart. Int. Law Dig. 228; Whart. Conf. Laws, § 356; 1 Kent, Comm. 26; Vatt. Law Nat. bk. 1, ch. 19, § 216; 1 Calvo, 552; Bluntschli, § 317; 1 Martens (French Trans. of Leo), 496; *Seagrove* v. *Parks*, 1 Q. B. Div. 551. The authorities noted so perfectly maintain the doctrine stated that quotation, amplification or illustration is unnecessary. The broad and fundamental principle is that the sovereignty of a nation extends to its private ships, and this dominion is never shared by a foreign power where the internal affairs of the vessel are alone involved, and where it is not within the territorial domain of such power. It results from the foregoing: (1) That tortious acts are governed by the law of the place where they are done. (2) That a foreign tribunal will never afford reparation for such acts, unless they are unjustified both by the law of the place where they occurred and by the law of the forum. (3) That a contract creating the relation of master and servant, made in a country for a service to be rendered in such country, imposes only such obligations, and confers only such rights, as the terms of the contract stipulate, and the laws of such country imply. (4) That the vessels of such country are, even upon the high seas, a detached, floating portion of its territory, and exclusively within the influence of its laws, so far as the internal economy of the vessel is concerned." — Ed.

[1] Arguments of counsel and the concurring opinions of Channell, B., and Lush, JJ., are omitted. — Ed.

ritory, for the prisoner was a seaman on board a merchant vessel, which, as to her crew and master, must be taken to have been at the same time under the protection of the British flag, and, therefore, also amenable to the provisions of the British law. It is true that the prisoner was an American citizen, but he had with his own consent embarked on board a British vessel as one of the crew. Although the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offence within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country. From the passage in the treatise of Ortolan, already quoted, it appears that, with regard to offences committed on board of foreign vessels within the French territory, the French nation will not assert their police law unless invoked by the master of the vessel, or unless the offence leads to a disturbance of the peace of the port; and several instances where that course was adopted are mentioned. Among these are two cases where offences were committed on board American vessels — one at the port of Antwerp, and the other at Marseilles — and where, on the local authorities interfering, the American court claimed exclusive jurisdiction. As far as America herself is concerned, it is clear that she, by the statutes of the 23d of March, 1825, has made regulations for persons on board her vessels in foreign parts, and we have adopted the same course of legislation. Our vessels must be subject to the laws of the nation at any of whose ports they may be, and also to the laws of our country, to which they belong. As to our vessels when going to foreign parts we have the right, if we are not bound, to make regulations. America has set us a strong example that we have the right to do so. In the present case, if it were necessary to decide the question on the 17 & 18 Vict., c. 104, I should have no hesitation in saying that we not now only legislate for British subjects on board of British vessels, but also for all those who form the crews thereof, and that there is no difficulty in so construing the statute; but it is not necessary to decide that point now. Independently of that statute, the general law is sufficient to determine this case. Here the offence was committed on board a British vessel by one of the crew, and it makes no difference whether the vessel was within a foreign port or not. If the offence had been committed on the high seas it is clear that it would have been within the jurisdiction of the admiralty, and the Central Criminal Court has now the same extent of jurisdiction. Does it make any difference because the vessel was in the river Garonne half-way between the sea and the head of the river? The place where the offence was committed was in a navigable part of the river below

bridge, and where the tide ebbs and flows, and great ships do lie and hover. An offence committed at such a place, according to the authorities, is within the Admiralty jurisdiction, and it is the same as if the offence had been committed on the high seas. On the whole I come to the conclusion that the prisoner was amenable to the British law, and that the conviction was right.

Byles, J. I am of the same opinion. I adhere to the opinion that I expressed at the trial. A British ship is, for the purposes of this question, like a floating island; and, when a crime is committed on board a British ship, it is within the jurisdiction of the Admiralty Court, and therefore of the Central Criminal Court, and the offender is as amenable to British law as if he had stood on the Isle of Wight and committed the crime. Two English and two American cases decide that a crime committed on board a British vessel in a river like the one in question, where there is the flux and reflux of the tide, and wherein great ships do hover, is within the jurisdiction of the Admiralty Court; and that is also the opinion expressed in Kent's Commentaries. The only effect of the ship being within the ambit of French territory is that there might have been concurrent jurisdiction had the French claimed it. I give no opinion on the question whether the case comes within the enactment of the Merchant Shipping Act. *Reg.* v. *Lopez*, 7 Cox C. C. 431; *Reg.* v. *Armstrong*, 13 Cox C. C. 184.

Blackburn, J. I am of the same opinion. It is not necessary to decide whether the case comes within the Merchant Shipping Act. If the offence could have been properly tried in any English court, then the Central Criminal Court had jurisdiction to try it. It has been decided by a number of cases that a ship on the high seas, carrying a national flag, is part of the territory of that nation whose flag she carries; and all persons on board her are to be considered as subject to the jurisdiction of the laws of that nation, as much so as if they had been on land within that territory. From the earliest times it has been held that the maritime courts have jurisdiction over offences committed on the high seas where great ships go, which are, as it were, common ground to all nations, and that the jurisdiction extends over ships in rivers or places where great ships go as far as the tide extends. In this case the vessel was within French territory, and subject to the local jurisdiction, if the French authorities had chosen to exercise it. Our decisions establish that the admiralty jurisdiction extends at common law over British ships on the high seas, or in waters where great ships go as far as the tide ebbs and flows. The cases *Rex* v. *Allen* and *Rex* v. *Jemot* are most closely in point, and establish that offences committed on board British ships in places where great ships go are within the jurisdiction of the Court

of Admiralty, and consequently of the Central Criminal Court. In America it appears, from the case of *The United States* v. *Wiltberger*, that it was held that the United States had no jurisdiction in the case of the crime of manslaughter committed on board a United States vessel in the river Tigris in China; but, as I understand the American cases of *Thomas* v. *Lane* and *The United States* v. *Coombes*, a rule more in conformity with the English decisions was laid down; and upon whose authority I take it that the American courts would agree with us. It is clear, therefore, that a person on board an American ship is subject to the American law. My view is, that when a person is on board a vessel sailing under the British flag, and commits a crime, that nation has a right to punish him for the crime committed by him; and clearly the same doctrine extends to those who are members of the crew of the vessel.

Conviction affirmed.[1]

[1] In *U. S.* v. *Bennett*, 1877, 3 Hughes, 466, Fed. Cas. No. 14,574, the crime was committed on the *Garonne* near the city of Bordeaux, and the decision was the same. See, also, *Reg.* v. *Lopez*, and *Reg.* v. *Sattler*, 1858, D. & B. 525.

In 1851, a case arose in reference to seamen, supposed not to be citizens of the United States, who, having committed a mutiny at sea, on board of the American vessel *Atalanta*, were brought back in the vessel to Marseilles, where, on the application of the consul of the United States, they were received and imprisoned by the local authorities on shore.

Six of them were afterwards on his application taken from prison and placed on board the *Atalanta* for conveyance to the United States under charge of crime. Then, with notice to the consul, but in spite of his remonstrance, the local authorities went on board of the *Atalanta*, forcibly resumed possession of the prisoners, and replaced them in confinement on shore. Mr. Mason, in a note of the 27th of June, 1856, says:

"It is the first instance, in which a vessel wearing the flag of the United States, lying in a French port, or a French ship lying in a port of the United States, has, since the date of the treaty, been visited by police officers without the authority of the consul." (MS. Department of State.) The correspondence between the two governments having been submitted to the Attorney-General of the United States, he concurred in opinion with the American Minister, "that the local authority of Marseilles exceeded its lawful power in substance, as well as in form, and that there could be no conflict on the part of France with other powers on account of the nationality of the prisoners, for they were always in the constructive, if not in the actual, custody of the United States." 8 Opin. Att'y-Gen. 73.

In the case of John Anderson, 1879, Great Britain admitted the contention of the United States, that a crime committed upon an American merchant vessel while sailing on the high seas was properly triable in the United States, and the action of the Indian authorities in trying Anderson in Calcutta, in which port the vessel subsequently arrived, was disavowed by the British Government. 1 Wharton's Digest, 123, 125. — Ed.

REGINA *v.* LESLEY.

COURT FOR CROWN CASES RESERVED, 1860.

(*Bell's Crown Cases*, 220.)

The prosecutor and others were Chilians who were banished by their government from Chili to England. The government of Chili hired the defendant to take the banished men to England in his vessel, then lying in the territorial waters of Chili. This plan was carried out and now the defendant is prosecuted for false imprisonment.[1]

ERLE, C. J.: — "In this case the question is whether a conviction for false imprisonment can be sustained upon the following facts. (Stating substantially as above.)

"Then, can the conviction be sustained for that which was done within the Chilian waters? We answer no.

"We assume that in Chili the act of the government toward its subjects was lawful; and although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign state, yet in other respects she is subject to the laws of that state as to acts done to the subjects thereof.

"We assume that the government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the government and under its authority.

"In *Dobree* v. *Napier*, 2 Bing. N. C., 781, the defendant, on behalf of the Queen of Portugal, seized the plaintiff's vessel for violating a blockade of a Portuguese port in time of war. The plaintiff brought trespass; and judgment was for the defendant, because the Queen of Portugal, in her own territory, had a right to seize the vessel and to employ whom she would to make the seizure; and therefore the defendant, though an Englishman seizing an English vessel, could justify the act under the employment of the Queen.

"We think that the acts of the defendant in Chili became lawful on the same principle, and that there is therefore no ground for the conviction.

"The further question remains, Can the conviction be sustained for that which was done out of the Chilian territory? and we think it can.

"It is clear that an English ship on the high sea, out of any for-

[1] Short statement substituted for that of the report. — ED.

eign territory, is subject to the laws of England ; and persons, whether foreign or English, on board such ship, are as much amenable to English law as they would be on English soil.

"In *Regina* v. *Sattler*, Dears. & Bell's C. C., 525, this principle was acted on, so as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea. The same principle has been laid down by foreign writers on international law among which it is enough to cite Ortolan, 'Sur la Diplomatie de la Mer,' liv. 2, cap. 13.

"The merchant shipping Act, 17 & 18 Vict. C. 104, § 267, makes the master and seamen of a British ship responsible for all offences against property or person committed on the sea out of her Majesty's dominions as if they had been committed within the jurisdiction of the admiralty of England.

"Such being the law, if the act of the defendant amounted to a false imprisonment, he was liable to be convicted. Now, as the contract of the defendant was to receive the prosecutor and the others as prisoners on board his ship and to take them, without their consent, over the sea to England, although he was justified in first receiving them in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to a false imprisonment.

"It may be that transportation to England is lawful by the law of Chili, and that a Chilian ship might so lawfully transport Chilian subjects ; but for an English ship, the laws of Chili, out of the state, are powerless, and the lawfulness of the acts must be tried by English law.

"For these reasons, to the extent above mentioned, the conviction is affirmed."

THE "BELGENLAND."

SUPREME COURT OF THE UNITED STATES, 1884.

(114 *United States Reports*, 355.)

This case grew out of a collision in mid-ocean between the Norwegian barque *Luna* and the Belgian steamer *Belgenland*, in consequence of which the *Luna* was run down and sunk. Part of the crew of the *Luna*, including the captain, were rescued by the steamer and brought to Philadelphia. The captain at once libelled the *Belgen-*

land. The District Court decided in favor of the libellant, giving a verdict for $50,000.

The Circuit Court confirmed the verdict, and the libellee now appeals to the U. S. Supreme Court. Only so much of the case is given as refers to jurisdiction.

Mr. Justice BRADLEY delivered the opinion of the court:[1]

* * * We shall content ourselves with inquiring what rule is followed by Courts of Admiralty in dealing with maritime causes arising between foreigners and others on the high seas.

"This question is not a new one in these courts. Sir William Scott had occasion to pass upon it in 1799. An American ship was taken by the French on a voyage from Philadelphia to London, and afterwards rescued by her crew, carried to England, and libelled for salvage; and the court entertained jurisdiction. The crew, however, though engaged in the American ship, were British born subjects, and weight was given to this circumstance in the disposition of the case. The judge, however, made the following remarks: 'But, it is asked, if they were American seamen, would this court hold plea of their demands? It may be time enough to answer this question whenever the fact occurs. In the meantime, I will say without scruple that I can see no inconvenience that would arise if a British court of justice was to hold plea in such a case; or conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions. For salvage is a question of *jus gentium*, and materially different from the question of a mariner's contract, which is a creature of the particular institutions of the country, to be applied and construed and explained by its own particular rules. There might be good reason, therefore, for this court to decline to interfere in such cases and to remit them to their own domestic forum; but this is a general claim, upon the general ground of *quantum meruit*, to be governed by a sound discretion, acting on general principles; and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question of such a nature, so to be determined.' *The Two Friends*, 1 Ch. Rob., 271, 278.

The law has become settled very much in accord with these views. That was a case of salvage; but the same principles would seem to apply to the case of destroying or injuring a ship, as to that of saving it. Both, when acted on the high seas between persons of different nationalities, come within the domain of the general law of nations, or *communis juris*, and are *prima facie* proper subjects of

[1] Short statement substituted for that of the report and portions of the judgment are omitted. — ED.

inquiry in any court of admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious, or injured, parties.

The same question of jurisdiction arose in another salvage case which came before this court in 1804, *Mason* v. *The Blaireau*, 2 Cranch, 240.

There a French ship was saved by a British ship, and brought into a port of the United States; and the question of jurisdiction was raised by Mr. Martin, of Maryland, who, however, did not press the point, and referred to the observations of Sir William Scott in *The Two Friends*. Chief Justice MARSHALL, speaking for the court, disposed of the question as follows :—'A doubt has been suggested,' said he, 'respecting the jurisdiction of the court, and upon reference to the authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court, that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it.' * * *

In the absence * * * of treaty stipulations, however, the case of foreign seamen is undoubtedly a special one, when they sue for wages under a contract which is generally strict in its character, and framed according to the laws of the country to which the ship belongs; framed also with a view to secure, in accordance with those laws, the rights and interests of the ship-owners as well as those of master and crew, as well when the ship is abroad as when she is at home. Nor is this special character of the case entirely absent when foreign seamen sue the master of their ship for ill-treatment. On general principles of comity, Admiralty Courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction.

But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor

when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it. * * *

In another case, Justice STORY examined the subject very fully, and came to the conclusion that, wherever there is a maritime lien on the ship, an Admiralty Court can take jurisdiction on the principle of the civil law, that in proceedings *in rem* the proper forum is the *locus rei sitæ*. He added: 'With reference, therefore, to what may be deemed the public law of Europe, a proceeding *in rem* may well be maintained in our courts where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy.'

That, as we have seen, was a case of bottomry, and Justice STORY in answer to the objection that the contract might have been entered into in reference to the foreign law, after showing that such law might be proven here, said: 'In respect to maritime contracts, there is still less reason to decline the jurisdiction, for in almost all civilized countries these are in general substantially governed by the same rules.'

Justice Story's decision in this case was referred to by Dr. Lushington with strong approbation in the case of the *Golubchick* 1 W. Rob., 143, decided in 1840, and was adopted as authority for his taking jurisdiction in that case. * * *

A Danish ship was sunk by a Bremen ship, and on the latter being libelled, the respondents entered a protest against the jurisdiction of the court. But jurisdiction was retained by Dr. LUSHINGTON who, amongst other things, remarked: 'An alien friend is entitled to sue (in our courts) on the same footing as a British-born subject, and if the foreigner in this case had been resident here, and the cause of action had originated *infra corpus comitatus*, no objection could have been taken. Reference being made to the observations of Lord Stowell in cases of seamen's wages, the judge said: 'All questions of collision are questions *communis juris;* but in case of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners is, whether the case be *communis juris* or not. * * * If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return, and, if she did, there is no part of the world to which they might not be sent for their redress.'

In the subsequent case of the *Griefswald*, 1 Swabey, 430, decided by the same judge in 1859, which arose out of a collision between a British barque and a Persian ship in the Dardanelles, Dr. Lushington said: 'In cases of collision, it has been the practice of this country, and, so far as I know, of the European States and of the United States of America, to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found, and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable.'

The subject has frequently been before our own Admiralty Courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that they will exercise it unless special circumstances exist to show that justice would be better subserved by declining it. * * *

Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured, or doing the service, should ever be denied justice in our courts; neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is pre-eminently one *communis juris*, and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it could be by the courts of either of the nations to which the litigants belong. As Judge Deady very justly said, in a case before him in the district of Oregon: 'The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found.' *Bernhard* v. *Greene*, 3 Sawyer, 230, 235.

As to the law which should be applied in cases between parties, or ships, of different nationalties, arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted.[1]

[1] See *The Lamington*, 1898, 87 Fed. 752, which states and follows the fundamental principles of this case. — Ed.

SECTION 18. — MUNICIPAL SEIZURES BEYOND THE THREE-MILE LIMIT.

CHURCH v. HUBBART.

SUPREME COURT OF THE UNITED STATES, 1804.

(2 *Cranch*, 187.)

While the American vessel *Aurora* was between four and five leagues from the Brazilian coast she was seized by the government of Brazil for attempting to carry on illicit trade with its citizens.

MARSHALL, Ch. J., delivered the opinion of the court.[1]

As a general principle, the nation which prohibits commercial intercourse with its colonies must be supposed to adopt measures to make that prohibition effectual. They must, therefore, be supposed to seize vessels coming into their harbors or hovering on their coasts in a condition to trade.* * *

To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory and is a hostile act, which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to search a neutral vessel on the high seas for contraband of war, is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy; so, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. * * *

In different seas and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government of the country, will be assented to. Thus in the channel * * *

[1] Statement of the case is omitted and only so much of the opinion is given as relates to the right of the Brazilian Government to seize a foreign vessel so situated. — ED.

the seizure of vessels on suspicion of attempting an illicit trade must necessarily be restricted to very narrow limits, but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further. * * *

The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended that it could only be exercised within the range of the cannon from their batteries. Indeed, the right given to our own revenue cutters, to visit vessels four leagues from our coast, is a declaration that in the opinion of the American government, no such principle as that contended for, has a real existence.[1]

[1] Mr. Dana, in speaking of this decision (Dana's Wheaton, 259, note), says, as to the assertion that the seizure of a vessel four leagues from the coast does not render the seizure invalid, "this remark must now be treated as an unwarranted admission. . . . It may be said that the principle is settled, that municipal seizures cannot be made, for any purpose, beyond territorial waters. It is also settled, that the limit of these waters is, in the absence of treaty, the marine league or the cannon-shot. It cannot now be successfully maintained, either that municipal visits and search may be beyond the territorial waters for special purposes, or that there are different bounds of that territory for different objects. . . . In the earlier cases, the courts were not strict as to standards of distance, where no foreign powers intervened in the causes. In later times, it is safe to infer that judicial as well as political tribunals will insist on a line of marine territorial jurisdiction for the exercise of force on foreign vessels in time of peace for all purposes alike."

There still stands upon the statute book of the United States a law passed in 1799 authorizing their revenue officers to stop and visit foreign vessels four leagues from the coast. The British "Hovering Act," passed in 1734, and which doubtless suggested the American act, contained a similar provision. But this, says Mr. Boyd (Boyd's Wheaton, 241), has long since been repealed. "The present custom's legislation makes a distinction as regards the extent of jurisdiction claimed for revenue purposes, between ships belonging to British subjects and ships belonging to foreigners." There is no longer any authority under English laws to visit a foreign vessel beyond the three-mile limit. See Custom's Consolidations Act, 1876, Sec. 134.

See further on this subject, the case of *Rose* v. *Himely*, 1808, 4 Cranch, 241, in which the Supreme Court of the United States held that a seizure, under customs regulations, of a foreign vessel beyond the territorial waters of a State, was not valid: See, also, the case of *Hudson* v. *Guestier*, 1810, 6 Cranch, 281; *The Apollon*, 1824, 9 Wheat. 362. In *The Itata* (United States and Chilean Claims Commission, convention of Aug. 7, 1892), 3 Moore, Int. Arb. 3067–3071, the question of seizure in foreign jurisdiction for violation of our neutrality laws was carefully considered. The judgment was as follows: "After an examination of many authorities on international law, and numerous decisions of courts, we are of opinion that the United States committed an act for which they are liable in damages and for which they should be held to answer." For facts of the case, see *U. S.* v. *Trumbull*, *infra*, 731. — Ed.

Section 19. — Piracy.

OPINION OF SIR LEOLINE JENKINS.

Charge to the Jury, 1668.

(*Life of Sir Leoline Jenkins*, I., LXXXVI.)

"There are some sorts of felonies and offences, which cannot be committed anywhere else but upon the sea, within the jurisdiction of the Admiralty. These I shall insist upon a little more particularly, and the chiefest in this kind is piracy.

"You are therefore to inquire of all Pirates and sea-rovers; they are in the eye of the law *hostes humani generis*, enemies not of one nation or of one sort of people only, but of all mankind. They are outlawed, as I may say, by the laws of all nations, that is, out of the protection of all princes and of all laws whatsoever. Everybody is commissioned, and is to be armed against them, as against rebels and traitors, to subdue and to root them out.

"That which is called robbing upon the highway, the same being done upon the water is called piracy. Now robbery, as 'tis distinguished from thieving or larceny, implies not only the actual taking away of my goods, while I am, as we say, in peace, but also the putting me in fear, by taking them away by force and arms out of my hands, or in my sight and presence; when this is done upon the sea, without a lawful commission of war or reprisals, it is downright piracy.

"And such was the generosity of our ancient English, such the abhorrence of our laws against pirates and sea-rovers, that if any of the King's subjects robbed or murdered a foreigner upon our seas or within our ports, though the foreigner happened to be of a nation in hostility against the King, yet if he had the King's passport, or the Lord Admiral's, the offender was published, not as a felon only, but this crime was made high treason, in that great Prince Henry the Fifth's time; and not only himself, but all his accomplices were to suffer as traitors against the crown and dignity of the King." [1]

[1] For the leading case of *U. S.* v. *Smith*, 1820, 5 Wheat. 153, see § 1, *supra*. — Ed.

UNITED STATES v. THE "AMBROSE LIGHT."

UNITED STATES DISTRICT COURT FOR SO. DIST. OF N. Y., 1885.

(25 *Federal*, 408.)

The libel in this case was filed to procure the condemnation of the brig *Ambrose Light*, which was brought into this port as prize on June 3, 1885, by Lieut. Wright and a prize crew, detached from the United States gun-boat *Alliance*, under Commander Clarke, by whose orders the brigantine had been seized on the twenty-fourth of April. The seizure was made in the Caribbean sea, about twenty miles to the westward of Cartagena.

The commander was looking for the insurgent Preston, by whose order Colon had shortly before been fired, to the great loss and injury of our citizens.

Observing the brigantine displaying a strange flag, viz., a red cross on a white ground, he bore down upon her, and brought her to by a couple of shots across her bows. Before coming to, she exhibited the Colombian flag. On examination, some sixty armed soldiers were found concealed below her decks, and one cannon was aboard, with a considerable quantity of shot, shell, and ammunition. Preston was not found. Her papers purported to commission her as a Colombian man-of-war, and read as follows: (Translation.)

"I, Pedroa Lara, governor of the province of Barranquilla, in the state of Bolivia, in the United States of Colombia, with full powers conferred by the citizen president of the state, I give to whom it may concern this *patente* of the sailing vessel *Ambrose Light*, that she may navigate as a Colombian vessel-of-war in the waters touching the coast of this republic, in the Atlantic ocean.

"Therefore, the general commandants and captains of the vessels of war of the friendly nations of Colombia are requested to give this vessel all the consideration that by right belongs to the vessels of the class of the *Ambrose Light* of all civilized nations. In the faith of which we have given these presents, and signed with rubric with the secretary of my office, in the city of Barranquilla, on the eighteenth day of the month of April, 1885.

(Signed) "Pedroa Lara

The Secretary [Sig.], "R. A. Del Valle.

(Indorsed:) "Office of the Military,

"Barranquilla, April 18, 1885.

"Registered and noted in folio and book, respectively.

"The General in Chief, N. Juneno Collante.

"Adjutant and Secretary, A. Solanom."

Believing this commission to be irregular, and to show no lawful authority to cruise as a man-of-war on the high seas, Commander Clarke reported her under seizure, in accordance with the naval regulations, to Admiral Jowett, commanding the North Atlantic squadron, then cruising in the Central American waters, and the admiral directed the vessel to be taken to New York for adjudication as prize. The vessel was at first supposed to belong to citizens of the United States. The proofs showed that she had been sold to, and legally belonged to, Colente, one of the chief military leaders of the insurgents at Barranquilla. None of her officers or crew were citizens of the United States. She was engaged upon a hostile expedition against Cartagena, and designed to assist in the blockade and siege of that port by the rebels against the established government of the United States of Colombia. She had left Sabanilla on April 20th, bound for Baru, near Cartagena, where she expected the soldiers aboard to disembark. She was under the orders of the colonel of the troops, whose instructions were to shoot the captain if disobedient to his orders. Further instructions were to fight any Colombian vessel not showing the white flag with a red cross.

Sabanilla, and a few other adjacent sea-ports, and the province of Barranquilla, including the city of Barranquilla, had been for some months previous, and still were, under the control of the insurgents. The proofs did not show that any other depredations or hostilities were intended by the vessel than such as might be incident to the struggle between the insurgents and the government of Colombia, and to the so-called blockade and siege of Cartagena.

As respects any recognition of the insurgents by foreign powers, it did not appear in evidence that up to the time of the seizure of the vessel, on April 24, 1885, a state of war had been recognized as existing, or that the insurgents had ever been recognized as a *de facto* government, or as having belligerent rights, either by the Colombian government, or by our own government, or by any other nation. The claimants introduced in evidence a diplomatic note from our Secretary of State to the Colombian minister, dated April 24, 1885, which, it was contended, amounted to a recognition by implication of a state of war. The government claimed the forfeiture of the ship as piratical, under the law of nations, because she was not sailing under the authority of any acknowledged power. The claimants contended that, being actually belligerent, she was in no event piratical by the law of nations; but if so, that the subsequent recognition of belligerency by our government by implication entitles her to a release.

Brown, J.[1] 6. That recognition by at least some established government of a "state of war," or of the belligerent rights of insurgents, is necessary to prevent their cruisers from being held legally piratical by the courts of other nations injuriously affected, is either directly affirmed, or necessarily implied from many adjudged cases; and I have found no adjudication in which a contrary view is even intimated.

This great weight of authority, drawn from every source that authoritatively makes up the law of nations, seems to me fully to warrant the conclusion that the public vessels of war of all nations, for the preservation of the peace and order of the seas, and the security of their own commerce, have the *right* to seize as piratical all vessels carrying on, or threatening to carry on, unlawful private warfare to their injury; and that privateers, or vessels of war, sent out to blockade ports, under the commissions of insurgents, unrecognized by the government of any sovereign power, are of that character, and derive no protection from such void commissions.

It thus appears that the rules laid down and implied in the decisions of our supreme court in the cases of *Rose* v. *Himely* and *U. S.* v. *Palmer*, nearly 70 years ago, have been since almost universally followed. The practical responsibility of determining whether insurgent vessels of war shall be treated as lawful belligerents, or as piratical, rests where the supreme court then in effect decided that it ought to rest, viz., with the political and executive departments of the government. These departments have it in their power, at any moment, through the granting or withholding of recognition of belligereney, and through the extent of such recognition as they may choose to accord, virtually to determine how such cruisers shall be treated by the courts.

Even after judgment and sentence the prisoners may, like Smith and his associates, convicted before Mr. Justice Grier, be treated, and exchanged, as prisoners of war. And it is with those departments, exclusively, that the discretion ought to rest to determine when and how its technical rights against rebel cruisers shall be enforced. Its naval regulations will be framed accordingly; and any seizures made under such regulations may be enforced, or at any moment remitted, at the pleasure of those departments.

Where insurgents conduct an armed strife for political ends, and avoid any infringement or menace of the rights of foreign nations on the high seas, the modern practice is, in the absence of treaty stipulations or other special ties, to take no notice of the contest. One of

[1] Only a few extracts are given from the elaborate "opinion" rather than "judgment" in this case. — Ed.

the earliest applications of this rule that I have met is in the answer of the states-general to Sir Joseph York's demand in 1779 for the surrender of Paul Jones' prizes as piratically captured, in which their Mightinesses say that 'they had for a century past strictly observed the maxim that they will in no respect presume to judge of the legality or illegality of the actions of those who, upon the open sea, have taken any vessels that do not belong to this country.' On this point Prof. Lawrence, in his recent Hand-book of Int. Law (London, 1884), says:

'When a community, not being a state in the eye of international law, resorts to hostilities, it may, in respect of war, be endowed with the rights and subjected to the obligations of a state if other powers accord it what is called recognition of belligerency. Neutral powers should not do this * * * unless it affect by the struggle the interests of the recognizing state. If the struggle is maritime, recognition is almost a necessity. The controversy of 1861 illustrates the whole question.'

The practice is stated by Hall as follows: 'When, however, piratical acts have a political object, and are directed solely against a particular state, it is not the practice for states other than that attacked to seize, and still less to punish, the persons committing them. It would be otherwise, so far as seizure is concerned, with respect to vessels manned by persons acting with a political object, if the crew, in the course of carrying out their object, committed acts of violence against ships of other states than that against which their political operation was aimed; and the mode in which the crew were dealt with would probably depend on the circumstances of the case.' Int. Law, § 81, p. 223.

Whether a foreign nation shall exercise its rights only when its own interests are immediately threatened, or under special provocations only after injuries inflicted by the insurgents, as in this case, at Colon, is a question purely for the executive department. But when a seizure has been made by the navy department, under the regulations, and the case is prosecuted before the court by the government itself, claiming *summum jus*,—its extreme rights—the court is bound to apply to the case the strict technical rules of international law. The right here asserted may be rarely enforced; the very knowledge that the right exists tends, effectually, in most cases, to prevent any violation of it, or at least any actual interference by insurgents with the rights of other nations. But if the right itself were denied, the commerce of all nations would be at the mercy of every petty contest carried on by irresponsible insurgents and marauders under the name of war.

In the absence of any recognition of these insurgents as belligerents, I therefore hold the *Ambrose Light* to have been lawfully seized, as bound upon an expedition technically piratical.[1]

[On the other ground, however, that the Secretary of State, by his note to the Colombian Minister, April 24, 1885, had recognized by implication a state of war, the vessel was released.]

[1] The judgment in the case of the *Ambrose Light* has called forth much adverse criticism; and on the whole the weight of opinion would seem to be against the position that insurgent vessels not molesting the ships of other nations may be treated as pirates. See a criticism of this case by Mr. Francis Wharton, in 3 Wharton's Digest, 469.

In the case of *United States* v. *Baker*, 1861, 5 Blatch. 6, Judge Nelson charged the jury that "if it were necessary on the part of the Government to bring the crime charge dagainst the prisoners (officers of the privateer *Savannah*) within the definition of robbery and piracy as known to the common law of nations, there would be great difficulty in so doing, perhaps, upon the counts, certainly upon the evidence. For that shows, if anything, an intent to depredate upon the vessels and property of one nation only, the United States, which falls far short of the spirit and intent which are said to constitute the essential elements of the crime. But the robbery charged in this case is that which the act of Congress (1820) describes as a crime, and may be denominated a statute offence as contradistinguished from that known to the law of nations. The act declares the person a pirate, punishable by death, who commits the crime of robbery upon the high seas, against any ship or vessel," &c. The jury did not agree in this case. But in Philadelphia four individuals were convicted for the same offence. — These arrests led to retaliatory action on the part of the Confederate States. And on the 31st of January, 1862, an order was issued by the Secretary of State, to the marshals, directing the transfer of all prisoners charged with piracy, including those who had been convicted at Philadelphia, to a military prison for the purpose, it was understood, of exchanging them as prisoners of war. Lawrence's Wheaton, 1863, p. 253, note; 3 Wharton's Digest, p. 465. For other judicial decisions touching the status of the confederates in the United States, see the Golden Rocket case — viz., *Dole* v. *The N. E. M. M. Ins. Co.*, 1863, 6 Allen, 373, in which it was held that the "rebels" in that war were not pirates *jure gentium*. The best report of this case, both as regards argument and judgment, is in 2 Clifford's Ct. Ct. Reports, 1864, 394–434. See, also, the singularly well-balanced and considered judgment of Woodward, C. J., in *Fifield* v. *Ins. Co.*, 1864, 47 Pa. St. 166, 168–174. See especially Dana's Wheaton, note 84, 196–200.

It may be of interest to know that Rear-Admiral (then Lieutenant) Albert Kautz, was the first prisoner to be exchanged in the Civil War, and that it was through his instrumentality and personal interview with President Lincoln that the exchange of prisoners was effectuated between the North and South. See Appleton's Cyclopedia of American Biography, *sub. nom.* Kautz, and two singularly delightful articles by the Rear-Admiral himself in Harper's Weekly, 1898, Vol. XLII. pp. 159–160; 178–182. — Ed.

THE MAGELLAN PIRATES.

ECCL. AND ADM. COURT, 1853.

(1 *Spinks' Eccl. & Adm. Rep.* 81.)

LUSHINGTON, J. (extract):—

"I apprehend that in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts, and piratical acts are robbery and murder upon the high seas. I do not believe that, even where human life was at stake, our courts of common law ever thought it necessary to extend their inquiry further, if it was clearly proved against the accused that they had committed robbery and murder upon the high seas. In that case they were adjudged to be pirates, and suffered accordingly. * * * It was never, so far as I am able to find, deemed necessary to inquire whether the parties so convicted had intended to rob or to murder on the high seas indiscriminately. Though the municipal law of different countries may and does differ in many respects as to its definition of piracy, yet I apprehend that all nations agree in this, that acts such as those which I have mentioned, when committed on the high seas, are piratical acts, and contrary to the law of nations. * * * I think it does not follow that, because persons who are rebels and insurgents may commit against the ruling powers of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons. It does not follow that rebels and insurgents may not commit piratical acts against the subjects of other States, especially if such acts were in no degree with the insurrection or rebellion. Even an independent State may, in my opinion, be guilty of piratical acts. What were the Barbary tribes of olden times? what are many of the African tribes at this moment? It is, I believe, notorious that tribes now inhabiting the African coast of the Mediterranean will send out their boats and catch any ships becalmed upon their coasts?

"Are they not pirates because, perhaps, their sole livelihood may not depend upon piratical acts? I am aware that it has been said that a State cannot be piratical, but I am not disposed to assent to such *dictum* as a universal proposition."[1]

[1] In the case of the *Montezuma*, 1877, it was held and correctly so that ships belonging to insurgents, and confining their operations to the parent government, are not

LE "LOUIS."

High Court of Admiralty, 1817.

(2 *Dodson*, 210.)

This was the case of a French vessel which sailed from Martinique on the 30th of January, 1816, destined on a voyage to the coast of Africa and back, and was captured ten or twelve leagues to the southward of Cape Mesurada, by the *Queen Charlotte* cutter, on the 11th of March in the same year, and carried to Sierra Leone.

She was proceeded against in the Vice-Admiralty Court of that colony, and the information pleaded, — 1st, that the seizors were duly and legally commissioned to make captures and seizures. 2d, That the seizure was within the jurisdiction of the court. 3d, That the vessel belonged to French subjects or others, and was fitted out, manned and navigated for the purpose of carrying on the African slave-trade, after that trade had been abolished by the internal laws of France, and by the treaty between Great Britain and France. 4th, That the vessel had bargained for twelve slaves at Mesurada, and was prevented by the capture alone from taking them on board. 5th, That the brig being engaged in the slave-trade, contrary to the laws of France, and the law of nations, was liable to condemnation, and could derive no protection from the French or any other flag. 6th, That the crew of the brig resisted the *Queen Charlotte*, and piratically killed eight of her crew, and wounded twelve others. 7th, That the vessel being engaged in this illegal traffic resisted the King's duly commissioned cruisers, and did not allow of search until overpowered by numbers. And 8th, That by reason of the circumstances stated, the vessel was out of the protection of any law, and liable to condemnation. The ship was condemned to his Majesty in the Vice-Admiralty Court at Sierra Leone, and from this decision an appeal was made to this court.

Judgment. — Sir W. Scott. — This ship was taken off Cape Mesurada, on the coast of Africa, on the 11th of March, 1816, by an English colonial armed vessel, after a severe engagement, which fol-

to be treated as pirates by foreign powers (Calvo's International Law, 1, 591); but it seems equally well established that rebels of one state may be treated as pirates by other States if they extend their hostile acts to the ships or citizens of the latter states. *The Huascar*, 1877, 3 Wharton's Digest, 474, and see comments on this case in Hall's Int. Law, 277-278. — Ed.

lowed an attempt to escape. The court has found occasion to lament that the particulars of this melancholy transaction are not more circumstantially brought to its notice; for, in the mass of matter with which these proceedings are clogged (matter which can have no application whatever to any question that could possibly be expected to arise in the case), no information is distinctly conveyed to the court, what preliminaries led to this unfortunate conflict, in which no fewer than twelve lives were lost on the British side, and three on the other, and in which several persons on both sides were wounded. The court is left to infer, from the general course of the transaction, that it originated in a demand to visit and search the vessel, on a suspicion of her being a slave trader, and in a resistance to that demand; the demand and the resistance being maintained to the length of producing the calamitous event which I have described.

The ship seized was, in appearance and in fact, a French ship, admitted both in the plea and in the argument to be so unquestionably, owned and navigated by Frenchmen, originally, indeed, built in America, and having been for a short time in British possession, which had ceased. She is immediately proceeded against in the Vice-Admiralty Court at Sierra Leone (whither she had been carried), as a French ship violating French law by the intention of purchasing slaves for the purpose of carrying them to her port in Martinique. There are some words in the libel which certainly can have no consistent meaning in the sentence in which they stand, but which, if they have any meaning at all, seem to intimate vaguely and unintelligibly an ownership somewhere else than in French subjects. Nothing, however, appears that at all excites a suspicion that she is not what she is treated as being both by the parties and by the court, a French ship. For the mere circumstance of her having had English, as well as other colors, on board, cannot, in the known practice of merchant vessels, excite any such suspicion. After the admission which has been made, that she had a contingent intention at least of trading in slaves, as well as other commodities, if a convenient opportunity should offer, I feel it not requisite to enter into the detail of the many circumstances which compel that admission. The number of iron manacles on board, the construction of the platforms, the magnitude of the coppers, the quantity and quality of the provisions in store, the negotiations with the natives at Mesurada, the mysterious passages which occur in the correspondence between the owners, all tend one way, to show a contingent, or rather a predominant intention so to trade; and this being admitted, the court will not deem itself guilty of any injustice in holding that the legal question is the same as if the intention were single and absolute; for

I have little doubt but that the contingency would have happened, and the opportunity would have offered and would have been used.

At Sierra, proceedings were commenced, which led to the first condemnation of the ship and cargo. Much argument has been employed to controvert the jurisdiction of the court upon the point of locality, which I do not think it necessary to examine for the determination of the present cause. I will suppose the jurisdiction to be duly founded, as far as the matter of locality is concerned, and consider only whether the sentence can be sustained, giving the authority which pronounced it the benefit of a supposed indisputable jurisdiction.

At the outset of the proceedings, the seizor describes himself as commissioned to make captures and seizures. It certainly appeared to be a singular commission that authorized him to make captures in time of peace; and it was therefore not an unnatural curiosity on the part of the court to desire to see it. The commission, after repeated requisitions, has been at last brought in, at a time extremely inconvenient for the purpose of any careful examination by the court, if that were necessary. It may, however, be sufficient to state that this commission professes to be issued by the governor of Sierra Leone, on the 25th of January, 1816, to be founded on the Slave Trade Act, 51 Geo. III., and to authorize the commander to seize and detain (for I do not find that the word capture occurs) all ships and vessels offending against that act, or any other act abolishing the slave trade; and, after stating these facts, to observe, that neither this British act of parliament, nor any commission founded on it, can affect any right or interest of foreigners, unless they are founded upon principles, and impose regulations, that are consistent with the law of nations. That is the only law which Great Britain can apply to them; and the generality of any terms employed in an act of parliament must be narrowed in construction by a religious adherence thereto.

Upon the course of the proceedings in the court of Sierra Leone, after the manner in which they have been adverted to in argument, I should desert my duty if I did not make some remark, without meaning at all to depart from that tenderness which is usually shown to mere informalities in the practice of Vice-Admiralty Courts. I have no doubt but that the gentleman under whose cognizance these proceedings passed, carried out with him, among many other laudable qualities, a proper zeal for the purposes of the establishment of Sierra Leone; and I have as little doubt that he possessed a still higher zeal for his own immediate and paramount duty, the correct and equal administration of justice to all parties who might come

before him. But it is impossible to deny that there occur in these proceedings incongruities, arising (as it should seem) from inattention somewhere, not only to the common forms of law, but to the rational principles on which they are founded. What was the natural, as well as legal course? Surely, simple and obvious enough; for the proctor, after lodging in the registry all the papers found on board, and citing by monition the party to appear, to give a libel (answering to the bill of indictment in criminal cases) stating the facts imputed, and the law that is charged to be violated, and praying the examination of his witnesses thereon, and the judgment of the court upon the effect of the documents and testimony to be produced. The party charged has a right to give his claim, stating the facts by which he undertakes to discharge himself from all legal censure, and to produce his witnesses thereon. Upon the result of the whole evidence so furnished, and of proper special interrogatories administered under the immediate authority of the judge, the court should pronounce its judgment. What is done here? In the first place, the prize interrogatories calculated for the transactions of war are, instantly on bringing in, applied to this transaction, which, however denominated a capture, and with whatever fatal violence accompanied, is in truth a transaction of peace. Then special interrogatories are administered, *non constat* by what authority, some of them, certainly, not very fairly (at least, according to common notions) addressed to the persons from whom the answers are to be extracted. It is in this late stage of the proceeding that the prosecutor brings forth his libel or charge, in which he tells the judge (whose exclusive province it is to decide on the sufficiency of the proofs) that "the case is incontestably proved," both in law and in fact; the law alleged being, that the slave trade is prohibited both by treaty and by the internal law of France; and the facts charged being, that the party was trading in slaves, and resisted search. In the same benevolent view of saving the judge the entire trouble of performing his duty, the prosecutor informs him that "there is no doubt of the ship's being fitted out for the slave trade," and "that the evidence of the master is all evasive," and prays a commission of inspection to ascertain the fact of which he had just before told him that no doubt whatever existed, and the party is then cited by monition to appear, after the case has been thus incontestably proved against him; and then, without a single witness examined upon the libel, without the smallest evidence produced of the foreign law, — though, upon all principles of common jurisprudence, foreign law is always to be proved as a fact, — the judge, having properly reduced the six counts of the libel to two, pronounces the ship to be a French ship, em-

ployed illegally (that is, against the French law) in the slave trade; secondly, that she resisted by force the legal search of the King's cruisers; and that, on both accounts, herself and cargo are to be confiscated. There is, I think, considerable difficulty in vindicating the correctness of these proceedings, except upon the supposition that persons charged with a concern in so odious a traffic are instantly to have a *caput lupinum* placed upon their shoulders, and are not entitled, in the course of proceedings against them, to the ordinary forms and measures of justice. However, without pressing further observation upon the proceedings which have led to the judgment, I hasten to the more important task of considering the propriety of the judgment itself, having just stated that the grounds are two — one, that this was a French ship, intentionally employed in the African slave trade; the other, that she resisted by force the King of England's commissioned cruiser.

Assuming the fact, which is indistinctly proved, that there was a demand, and a resistance producing the deplorable results here described, I think that the natural order of things compels me to inquire first, whether the party who demanded had a right to search; for if not, then not only was the resistance to it lawful, but likewise the very fact on which the other ground of condemnation rests is totally removed. For if no right to visit and search, then no ulterior right of seizing and bringing in, and proceeding to adjudication; and it is in the course of those proceedings alone, that the facts are produced, that she is a French ship trading in slaves; and if these facts are made known to the seizor by his own unwarranted acts, he cannot avail himself of discoveries thus unlawfully produced, nor take advantage of the consequences of his own wrong. Supposing, however, that it should appear that he had a right to visit and search, and therefore to avail himself of all the information he so acquired, the question would then be, whether that information has established all the necessary facts? The first is, that this was a French ship intentionally employed in the slave trade, which, I have already intimated, appears to be sufficiently shown. The second is, that such a trading is a contravention of the French law; for it has been repeatedly admitted that the court, in order to support this sentence of condemnation, must have the foundation of the trade being prohibited by the law of the country to which the party belongs.

Upon the first question, whether the right of search exists in time of peace, I have to observe, that two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct states. Relative magnitude

creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbor; and any advantage seized upon that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their politic and private capacities, to preserve inviolate. The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any one of its subjects, has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals. This right, incommodious as its exercise may occasionally be to those who are subjected to it, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defence, in preventing the enemy from being supplied with the instruments of war, and from having his means of annoyance augmented by the advantages of maritime commerce. Against the property of his enemy each belligerent has the extreme rights of war. Against that of neutrals, the friends of both, each has the right of visitation and search, and of pursuing an inquiry whether they are employed in the service of his enemy, the right being subject, in almost all cases of an inquiry wrongfully pursued, to a compensation in costs and damages.

With professed pirates there is no state of peace. They are the enemies of every country, and at all times; and therefore are universally subject to the extreme rights of war. An ancient authority, the laws of Oleron, section 45, composed at the time of the Crusades, and as supposed by an eminent leader in those expeditions, our own Richard I., represents infidels as equally subject to those rights; but this rests partly upon the ground of notions long ago exploded, that such persons could have no fellowship, no peaceful communion with the faithful; and still more upon the ground of fact that they were for many centuries engaged in real hostilities with the Christian states. Another exploded practice was that of princes granting private letters of marque against the subjects of powers in amity, by whom they had been injured, without being able to obtain redress from the sovereign or tribunals of that country. But at present, under the law, as now generally understood and practised, no nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim.

If it be asked why the right of search does not exist in time of peace as well as in war, the answer is prompt; that it has not the same foundation on which alone it is tolerated in war, — the necessities of self-defence. They introduced it in war; and practice has established it. No such necessities have introduced it in time of peace, and no such practice has established it. It is true, that wild claims (alluded to in the argument) have been occasionally set up by nations, particularly those of Spain and Portugal, in the East and West Indian seas: but these are claims of a nature quite foreign to the present question, being claims not of a general right of visitation and search upon the high seas unappropriated, but extravagant claims to the appropriation of particular seas, founded upon some grants of a pretended authority, or upon some ancient exclusive usurpation. Upon a principle much more just in itself and more temperately applied, maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has, for their common convenience, allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are our hovering laws, which within certain limited distances more or less moderately assigned, subject foreign vessels to such examination. This has nothing in common with a right of visitation and search upon the unappropriated parts of the ocean. A recent Swedish claim of examination on the high seas, though confined to foreign ships bound to Swedish ports, and accompanied in a manner not very consistent or intelligible, with a disclaimer of all right of visitation, was resisted by our government as unlawful, and was finally withdrawn.

The right of visitation being in this present case exercised in time of peace, the question arises, how is it to be legalized? And looking to what I have described as the known existing law of nations evidenced by all authority and all practice, it must be upon the ground that the captured vessel is to be taken legally as a pirate, or else some new ground is to be assumed on which this right which has been distinctly admitted not to exist generally in time of peace can be supported. Wherever it has existed, it has existed upon the ground of repelling injury, and as a measure of self-defence. No practice that exists in the world carries it farther.

It is perfectly clear, that this vessel cannot be deemed a pirate from any want of a national character legally obtained. She is the property not of sea rovers, but of French acknowledged domiciled subjects. She has a French pass, French register, and all proper

documents, and is an acknowledged portion of the mercantile marine of that country. If, therefore, the character of a pirate can be impressed upon her, it must be only on the ground of her occupation as a slave trader; no other act of piracy being imputed. The question then comes to this: — Can the occupation of this French vessel be legally deemed a piracy, inferring, as it must do, if it be so, all the pains and penalties of piracy?

I must remember that, in discussing this question, I must consider it, not according to any private moral apprehensions of my own (if I entertained them ever so sincerely, but as the law considers it: and, looking at the question in that direction, I think it requires no labor of proof to show that such an occupation cannot be deemed a legal piracy. The very statute lately passed, which makes it a transportable offence in any British subject to be concerned in this trade, affords a decisive proof that it was not liable to be considered as a piracy, and a capital offence, as it would be in foreigners as well as British subjects, if it was a piracy at all. In truth it wants some of the distinguishing features of that offence. It is not the act of freebooters, enemies of the human race, renouncing every country, and ravaging every country in its coasts and vessels indiscriminately, and thereby creating an universal terror and alarm; but of persons confining their transactions (reprehensible as they may be) to particular countries, without exciting the slightest apprehension in others. It is not the act of persons insulting and assaulting coasts and vessels against the will of the governments and the course of their laws, but of persons resorting thither to carry on a traffic (as it is there most unfortunately deemed), not only recognized but invited by the institutions and the administrations of those barbarous communities. But it is unnecessary to pursue this topic further. It has not been contended in argument, that the common case of dealing in slaves could be deemed a piracy in law. In all the fervor of opinion which the agitation of all questions relating to this practice has excited in the minds of many intelligent persons in this country, no attempt has ever been thought of, at least with any visible effect, to submit any such question to the judgment of the law by such a prosecution of any form instituted in any court: and no lawyer, I presume, could be found hardy enough to maintain, that an indictment for piracy could be supported by the mere evidence of a trading in slaves. Be the malignity of the practice what it may, it is not that of piracy, in legal consideration.

Piracy being excluded, the court has to look for some new and peculiar ground: but in the first place a new and very extensive ground is offered to it by the suggestion, which has been strongly

pressed, that this trade, if not the crime of piracy, is nevertheless crime, and that every nation, and indeed every individual has not only a right, but a duty, to prevent in every place the commission of crime. It is a sphere of duty sufficiently large that is thus opened out to communities and to their members. But to establish the consequence required, it is first necessary to establish that the right to interpose by force to prevent the commission of crime, commences not upon the commencement of the overt act, nor upon the evident approach towards it, but on the bare surmise grounded on the mere possibility; for unless it goes that length it will not support the right of forcible inquiry and search. What are the proximate circumstances which confer on you the right of intruding yourself into a foreign ship, over which you have no authority whatever, or of demanding the submission of its crew to your inquiry, whether they mean to deal in the traffic of slaves, not in your country, but in one with which you have no connection? Where is the law that has defined those circumstances and created that right under their existence? Secondly, it must be shown that the act imputed to the parties is unquestionably and legally criminal by the universal law of nations; for the right of search claimed makes no distinctions, and in truth can make none; for till the ship is searched it cannot be known whether she is a slave trader or not, and whether she belongs to a nation which admits the act to be criminal, or to one which maintains it to be simply commercial, — and I say legally criminal, because neither this court nor any other can carry its private apprehensions, independent of law, into its public judgments on the quality of actions. It must conform to the judgment of the law upon that subject; and acting as a court in the administration of law, it cannot attribute criminality to an act where the law imputes none. It must look to the legal standard of morality; and upon a question of this nature, that standard must be found in the law of nations as fixed and evidenced by general and ancient and admitted practice, by treaties and by the general tenor of the laws and ordinances, and the formal transactions of civilized states; and looking to those authorities, I find a difficulty in maintaining that the traffic is legally criminal.

Let me not be misunderstood, or misrepresented, as a professed apologist for this practice, when I state facts which no man can deny, — that personal slavery arising out of forcible captivity is coeval with the earliest periods of the history of mankind, — that it is found existing (and as far as appears without animadversion) in the earliest and most authentic records of the human race, — that it is recognized by the codes of the most polished nations of antiquity, — that under

the light of Christianity itself, the possession of persons so acquired has been in every civilized country invested with the character of property, and secured as such by all the protections of law, — that solemn treaties have been framed and national monopolies eagerly sought, to facilitate and extend the commerce in this asserted property, — and all this, with all the sanctions of law, public and municipal, and without any opposition, except the protests of a few private moralists, little heard and less attended to, in every country, till within these very few years, in this particular country. If the matter rested here, I fear it would have been deemed a most extravagant assumption in any court of the law of nations, to pronounce that this practice, the tolerated, the approved, the encouraged object of law, ever since man became subject to law, was prohibited by that law, and was legally criminal. But the matter does not rest here. Within these few years a considerable change of opinion has taken place, particularly in this country. Formal declarations have been made, and laws enacted in reprobation of this practice; and pains, ably and zealously conducted, have been taken to induce other countries to follow the example; but at present with insufficient effect: for there are nations which adhere to the practice, under all the encouragement which their own laws can give it. What is the doctrine of our courts of the law of nations relatively to them? Why, that their practice is to be respected; that their slaves if taken are to be restored to them; and if not taken under innocent mistake, to be restored with costs and damages. All this surely, upon the ground that such conduct on the part of any state is no departure from the law of nations; because, if it were, no such respect could be allowed to it, upon an exemption of its own making; for no nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own. And if our understanding and administration of the law of nations be, that every nation, independently of treaties, retains a legal right to carry on this traffic, and that the trade carried on under that authority is to be respected by all tribunals, foreign as well as domestic, it is not easy to find any consistent grounds on which to maintain that the traffic, according to our views of that law, is criminal.

Against the subjects of countries which have issued declarations hostile to the trade, the courts have not unfairly applied the *argumentum ad homines*. At the same time, it is impossible not to feel (and with concern) that if the real understanding of the law, both in this country and others, is to be collected from public acts as well as from public declarations, it will at least be difficult to determine with certainty and precision what that understanding really is; some

parts of their systems looking one way, and some another. The notorious fact is, that in the dominions of this country and others, many thousands of persons are held as legal property, they and their posterity, upon no other original title than that which I am now called upon to pronounce a crime, — every one of these instances attended with all the aggravation that appertains to the long continuation of crime, if crime it be; and yet protected by law, with all the securities that can be given to property in its most respected forms. Recent treaties with foreign powers stipulate for a permitted continuance of this traffic to them for a course of years, and in extensive districts, and without any limitation of the numbers they may export, — that is, according to the argument that has been held, contracts for the commission of crime, without stint, throughout those districts, and during those periods of time! In such a state of law and fact, at home and abroad, it is more than difficult to arrive at the conclusion, and for this court, representing this country, to notify such conclusion to foreign parties, that, in its clear and consistent judgment of the law of nations upon this traffic, it is a gross violation of that law.

Much stress is laid upon a solemn declaration of very eminent persons assembled in Congress, whose rank, high as it is, is by no means the most respectable foundation of the weight of their opinion that this traffic is contrary to all religion and morality. Great as the reverence due to such authorities may be, they cannot, I think, be admitted to have the force of overruling the established course of the general law of nations. Suppose an equal number of foreign personages, equal in rank and station, and, if such could be found, in talents, were to declare that the right of search in time of war, as exercised on neutrals, was contrary to all reason and justice; this country, I presume, would not attribute any such effect to such opinions so delivered, even although they were not accompanied, as this declaration is, with any contemporary acts, which evinced that they were considered by the parties themselves rather as speculative opinions than as drawing after them the obligation of a public and practical conformity; for otherwise some difficulty might occur in reconciling the stipulated continuation of this traffic contained in some treaties framed at no great distance of time, with the description of its nature and quality as represented in this declaration.

It is next said that every country has a right to enforce its own navigation laws; and so it certainly has, so far as it does not interfere with the rights of others. It has a right to see that its own vessels are duly navigated, but it has no right in consequence to visit and search all the apparent vessels of other countries on the

high seas, in order to institute an inquiry whether they are not in truth British vessels violating British laws. No such right has ever been claimed, nor can it be exercised without the oppression of interrupting and harassing the real and lawful navigation of other countries; for the right of search when it exists at all, is universal, and will extend to vessels of all countries, whether they tolerate the slave trade or not; and whether the vessels are employed in slave trading or in any other traffic. It is no objection to say that British ships may thus by disguise elude the obligations of British law. The answer of the foreigner is ready, that you have no right to provide against that inconvenience by imposing a burden upon his navigation. If even the question were reduced to this, that either all British ships might fraudulently escape, or all foreign ships be injuriously harassed, Great Britain could not claim the option to embrace the latter branch of the alternative. When you complain that the regulation cannot be enforced without the exercise of such a right, the answer again is, that you ought to not make regulations which you cannot enforce without trespassing on the rights of others. If it were a matter by which your own safety was affected, the necessities of self-defence would fully justify; but in a matter in which your own safety is in no degree concerned, you have no right to prevent a suspected injustice towards another, by committing an actual injustice of your own.

The next argument is, that the legislature must have contemplated the exercise of this right in time of peace; otherwise they have left the remedy incomplete, and peace in Europe will be war in Africa. The legislature must be understood to have contemplated all that was within its power, and no more. It provided for the existing occasion, and left to future wisdom to provide for future times. Nothing can be more clear, than that it was so understood by the British Government; for the project of the treaty proposed by Great Britain to France, in 1815, is, "that permission should be reciprocally given by each nation to search and bring in the ships of each other;" and when the permission of neutrals to have their ships searched is asked at the commencement of a war, it may then be time enough to admit that the right stands on exactly the same footing in time of war and in time of peace. The fact turned out to be, that such permission was actually refused by France, upon the express ground that she would not tolerate any maritime police to be exercised on her subjects, but by herself. Nor can it be matter of just surprise or resentment, that that people should be willing to retain, what every independent nation must be averse to part with, the exclusive right of executing their own laws.

It is pressed as a difficulty, what is to be done, if a French ship laden with slaves for a French port is brought in? I answer, without hesitation, restore the possession which has been unlawfully divested — rescind the illegal act done by your own subject; and leave the foreigner to the justice of his own country. What evil follows? If the laws of France do not prohibit, you admit that condemnation cannot take place in a British court. But if the law of France be what you contend, what would have followed upon its arrival at Martinique, the port whither it was bound? That all the penalties of the French law would have been immediately thundered upon it. If your case be true, there will be no failure of justice. Why is the British judge to intrude himself *in subsidium juris*, when everything requisite will be performed in the French court in a legal and effectual manner? Why is the British judge, professing, as he does, to apply the French law, to assume cognizance for the mere purpose of directing that the penalties shall go to the British Crown and its subjects, which that law has appropriated to the French Crown and its subjects, thereby combining, in one act of this usurped authority, an aggression upon French property as well as upon French jurisdiction?

It is said, and with just concern, that if not permitted in time of peace it will be extremely difficult to suppress the traffic. It will be so, and no man can deny, that the suppression, however desirable, and however sought, is attended with enormous difficulties; difficulties which have baffled the most zealous endeavors of many years. To every man it must have been evident that without a general and sincere concurrence of all maritime states in the principle and in the proper modes of pursuing it, comparatively but little of positive good could be acquired; so far at least, as the interests of the victims of this commerce were concerned in it; and to every man who looks to the rival claims of these states, to their established habit of trades, to their real or pretended wants, to their different modes of thinking, and to their real mode of acting upon this particular subject, it must be equally evident that such a concurrence was matter of very difficult attainment. But the difficulty of the attainment will not legalize measures that are otherwise illegal. To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa by trampling on the independence of other states in Europe; in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice. Obtain the concurrence of other nations, if you can, by application, by remonstrance, by example, by every peaceable instrument which man

can employ to attract the consent of man. But a nation is not justified in assuming rights that do not belong to her, merely because she means to apply them to a laudable purpose; nor in setting out upon a moral crusade of converting other nations by acts of unlawful force. Nor is it to be argued, that because other nations approve the ultimate purpose, they must therefore submit to every measure which any one state or its subjects may inconsiderately adopt for its attainment. In this very case nothing can be clearer than that the only French law produced is in direct contradiction to such a notion; because approving as it does (though to a very limited extent) the abolition, it nevertheless reserves to its own authorities the cognizance of each cause and the appropriation of the penalties.

If I felt it necessary to press the consideration further, it would be by stating the gigantic mischiefs which such a claim is likely to produce. It is no secret, particularly in this place, that the right of search in time of war, though unquestionable, is not submitted to without complaints loud and bitter, in spite of all the modifications that can be applied to it. If this right of war is imported into peace by convention, it will be for the prudence of states to regulate by that convention the exercise of the right with all the softenings of which it is capable. Treaties, however, it must be remembered, are perishable things, and their obligations are dissipated by the first hostility. The covenants, however solemn, for the abolition of the trade, or for the exercise of modes of prevention, coexist only with the relations of amity among the confederate states. At the same time it may be hoped, that so long as the treaties do exist, and their obligations are sincerely and reciprocally respected, the exercise of a right, which *pro tanto* converts a state of peace into a state of war, may be so conducted as not to excite just irritation. But if it be assumed by force, and left at large to operate reciprocally upon the ships of every state (for it must be a right of all against all), without any other limits as to time, place, or mode of inquiry than such as the prudence of particular states, or their individual subjects, may impose, I leave the tragedy contained in this case to illustrate the effects that are likely to arise in the very first stages of the process, without adding to the account what must be considered as a most awful part of it, the perpetual irritation and the universal hostility which are likely to ensue.

Let it however be taken, for the present, that the whole of these premises, tending to show that no right of search upon the high seas exists in time of peace, are either unsound in themselves, or are strained to produce a conclusion that is so; I proceed to inquire how far the French law had actually abolished the slave trade at the time

this adventure occurred; having already observed that if it were not, the sentence of condemnation was admitted to be unmaintainable, and that no proof whatever of any French law was produced in the court below either by the exhibition of the law itself or by the information received from foreign professors and practisers of that law, or by anything else than the mere assertion of the prosecutor in the libel. What proof is offered is brought in upon the appeal, and the question depends on its sufficiency.

The actual state of the matter, as I collect it from these documents, Appendix (H), is this: On the 27th of July, 1815, the British minister at Paris writes a note to Prince Talleyrand, then minister to the King of France, inclosing a protocol of the fifteenth conference, and expressing a desire, on the part of his court, to be informed, whether, under the law of France, as it then stood, it was prohibited to French subjects to carry on the slave trade, Appendix (I). The French minister informs him, in answer, on the 30th of July, that the law of the Usurper on that subject was null and void (as were all his decrees); but that his most Christian Majesty had issued directions, that on the part of France "the traffic should cease from the present time everywhere and forever." In what form these directions were issued, or to whom addressed, does not appear, but upon such authority it must be presumed that they were actually issued. It is, however, no violation of the respect due to that authority to inquire what was the result or effect of those directions so given. What followed in obedience to them in any public and binding form? And I fear I am compelled to say that nothing of the kind followed, and that the directions must have slept in the portfolio of the office to which they were addressed; for it is, I think, impossible that if any public and authoritative ordinance had followed, it could have escaped the sleepless attention of many persons in our own country to all public foreign proceedings upon this interesting subject. Still less would it have escaped the notice of the British resident minister, who at the distance of a year and a half is compelled on the part of his own court to express a curiosity to know what laws, ordinances, instructions, and other public and ostensible acts had passed for the abolition of the slave trade.

On the 30th of November in the same year, the additional article of the definite treaty, Appendix (N), a very solemn instrument most undoubtedly, is formally and publicly executed, and it is in these terms: "The high contracting parties, sincerely desiring to give effect to the measures on which they deliberated at the Congress of Vienna, for the complete and universal abolition of the slave trade, and having each in their respective dominions prohibited, without

restriction, their colonies and subjects, from taking any part whatever in this traffic, engage to renew, conjointly, their efforts, with a view to ensure final success to the principles which they proclaimed in the declaration of the 8th February, 1815, and to concert, without loss of time, by their minister at the court of London, the most effectual measures for the entire and definitive abolition of a traffic so odious and so highly reproved by the laws of religion and nature."

Now what are the effects of this treaty? According to the view I take of it they are two, and two only; one declaratory of a fact, the other, promissory of future measures. It is to be observed that the treaty itself does not abolish the slave trade, it does not inform the subjects that the trade is hereby abolished, and that by virtue of the prohibitions therein contained, its subject shall not in future carry on that trade; but the contracting powers mutually inform each other of the fact, that they have in their respective dominions abolished the slave trade, without stating at all the mode in which that abolition had taken place. It next engages to take future measures for the universal abolition. That, with respect to both the declaratory and promissory parts, Great Britain has acted with the *optima fides* is known to the whole world, which has witnessed its domestic laws as well as its foreign negotiations.

I am very far from intimating that the government of this country did not act with perfect propriety in accepting the assurance that the French Government had actually abolished the slave trade, as a sufficient proof of the fact; but the fact is now denied by a person who has a right to deny it; for though a French subject, he is not bound to acknowledge the existence of any law that has not publicly appeared, and the other party having taken upon himself the burden of proving it in the course of a legal inquiry, the court is compelled to demand and expect the ordinary evidence of such a disputed fact.

It was not till the 15th of January, Appendix (R), in the present year that the British resident minister applies for the communication I have described, of all laws, instructions, ordonnances, and so on; he receives in return, what is delivered by the French minister as the ordonnance, bearing date only one week before the requested communication, namely, the 8th of January, Appendix (P). It has been asserted, in argument, that no such ordonnance has yet up to this very hour even appeared in any printed or public form, however much it might import both French subjects and the subjects of foreign states so to receive it; how that fact may be I cannot say; but I observe it appears before me in a manuscript form, and by inquiry at the Secretary of State's office I find it exists there in no other plight or condition.

In transmitting this to the British Government, the British minister observes, it is not the document he had reason to expect, and certainly with much propriety; for how does the document answer his requisition? His requisition is for all laws, ordonnances, instructions, and so forth. How does this, a simple ordonnance, professing to have passed only a week before, realize the assurance given on the 30th of July, 1815, that the traffic "should cease from the present time everywhere and forever"? Or how does this realize the promise made in November, that measures should be taken without loss of time to prohibit not only French colonies but French subjects likewise from taking any part whatever in this traffic? What is this regulation in substance? Why it is a mere prospective colonial regulation, prohibiting the importation of slaves into the French colonies from the 8th of January, 1817? Consistently with this declaration, even if it does exist in the form and with the force of a law, French subjects may be yet the common carriers of slaves to any foreign settlement that will admit them, and may devote their capital and their industry, unmolested by law, to the supply of any such markets.

Supposing, however, the regulations to contain the fullest and most entire fulfilment of the engagement of France, both in time and in substance, what possible application can a prospective regulation of January, 1817, have to a transaction of March in 1816?

The counsel, fully sensible of the difficulty, have been obliged to resort, first, to the conduct of the master, whose studious concealment of his transactions argues, as they contend, his consciousness of their illegality. That, from the fervor which the agitation of such questions had excited, anything and everything might be feared in that quarter of the globe is not at all extraordinary; but the concealment of the master, if even much greater than it is, would not, under those apprehensions, or indeed under any apprehensions, prove the existence of a law that did not exist. They are next driven to the supposition of intermediate edicts, though the French minister has not thought fit to produce them. I must observe, first, that the prohibition of the introduction of slaves into her colonies would be the first step that would be taken, or, as they express it, the initiative of any course of regulations; and, secondly, that nobody is now to be told that a modern edict which does not appear, cannot be presumed; and that no penal law of any state can bind the conduct of its subjects, unless it is conveyed to their attention in a way which excludes the possibility of honest ignorance. Surely, there is no case in which the maxim, that what does not appear is to be treated in the same way as if it did not exist, more fully and forcibly applies than one

in which they have been demanded by the person who had a right to demand them, and have been withheld by those who had a duty to produce them. The very production of a law professing to be enacted in the beginning of 1817, is a satisfactory proof that no such law existed in 1816, the year of this transaction.

It would be going further than the necessities of the present case require me to do, to say that the evidence now offered does not enable me to assert that the French law prohibited its subjects from taking any part whatever in this traffic. It is enough to say, that no law is shown, which can have any bearing upon this transaction. The Usurper's law was dead-born; and if any law existed at the time of this transaction, it must be that which permitted the traffic for five years; for the authority of that law could not be destroyed by the usurpation; but whether it had existence or not, the seizor has entirely failed in the task he has undertaken of proving the existence of a prohibitory law, enacted by the legal government, which can be applied to the present transaction, and therefore upon that ground, as well as upon the other, I think myself called upon to reverse this judgment.

Upon the matter of costs and damages that have been prayed, I must observe that it is the first case of the kind, and that the question itself is *primæ impressionis*, and that upon both grounds it is not the inclination of the court to inflict such a censure. If a second case should occur, it will require (in my judgment till corrected), and undoubtedly shall receive, a different consideration.

[1] For other cases upon the subject of the slave trade, see *The Amédie*, 1810, 1 Act. 240 (per Sir Wm. Grant); *The Fortuna*, 1811, 1 Dod. 81; *Madrazo* v. *Willes*, 1820, 3 B. & Ald. 353; *The Antelope*, 1825, 10 Wheat. 66. See also Dana' Wheaton, notes 83 (193–195), 84 (196–200), 85 (201–203). — Ed.

CHAPTER IV.

NATIONALITY.

Section 20. — Indelible Allegiance — Expatriation.

THE CASE OF ÆNEAS MACDONALD, ALIAS ANGUS MACDONALD, 1747.

(*Foster's Crown Law*, 59.)

In the year 1747, a bill of indictment was found against him, under the special commission in Surry, for the share he had in the late rebellion. The indictment ran in the same form as those against the other prisoners, without any averment that he was in custody before the first of January, 1746. But the counsel for the Crown were aware of the exception taken in the case of Mr. Townly and others, and that since the whole proceeding against the prisoner was subsequent to January, 1746, the answer then given would not serve the present case. That bill was therefore withdrawn before the prisoner pleaded to it; and a new bill concluding with an averment that he was apprehended and in custody before the first of January, 1746, was preferred and found against him. On that bill he was arraigned in July, 1747, and his trial came on the 10th of December following.

The overt acts charged in the indictment were sufficiently proved: and also that the prisoner was apprehended and in custody before the first of January, 1746.

The counsel for the prisoner insisted that he was born in the dominions of the French King, and on this point they put his defence.

But apprehending that the weight of the evidence might be against them, as indeed it was, with regard to the place of the prisoner's birth, they endeavored to captivate the jury and bystanders, by representing the great hardship of a prosecution of this kind against a person, who, admitting him to be a native of Great Britain, had received his education from his early infancy in France; and spent his riper years in a profitable employment in that kingdom, where all his hopes centred: and speaking of the doctrine of natural allegiance, they represented it as a slavish principle, not likely to prevail in these times; especially as it seemed to derogate from the principles of the revolution.

Here the court interposed; and declared, that the mentioning the case of the revolution as a case any way similar to that of the prisoner, supposing him to have been born in Great Britain, can serve no purpose but to bring an odium on that great and glorious transaction. It never was doubted that a subject-born, taking a commission from a foreign prince and committing high treason, may be punished as a subject for that treason, notwithstanding his foreign commission. It was so ruled in Dr. Storey's case: and that case was never yet denied to be law. It is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince. Nor is it in the power of any foreign prince by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown.

However, as the prisoner's counsel had mentioned his French commission as a circumstance tending in their opinion to prove his birth in France, the court permitted it to be read, the Attorney-General consenting. It was dated, the first of June, 1745, and appointed the prisoner commissary of the troops of France, which were then intended to embark for Scotland.

The court, with the consent of the counsel for the Crown, permitted the cartel between France and Great Britain for the exchange or ransom of prisoners likewise to be read; and observed, that as it relateth barely to the exchange or ransom of prisoners of war, it can never extend to the case of the prisoner at the bar, supposing him to be a subject-born; because by the laws of all nations, subjects taken in arms against their lawful prince, are not considered as prisoners of war, but as rebels; and are liable to the punishment ordinarily inflicted on rebels.

Lord Chief Justice Lee, in his direction to the jury, told them, that the overt acts laid in the indictment being fully proved, and not denied by the prisoner, or rather admitted by his defence, the only fact they had to try was, whether he was a native of Great Britain; if so, he must be found guilty. And as to that point, he said the presumption in all cases of this kind is against the prisoner; and the proof of his birth out of the King's dominions, where the prisoner putteth his defence on that issue, lieth upon him. But whether the evidence that had been given in the present case (which he summed up very minutely), did or did not amount to such proof, he left to their consideration.

The jury found him guilty, but recommended him to mercy. He received sentence of death as in cases of high treason; but was afterward pardoned upon the conditions mentioned below.[1]

[1] Banishment. — Ed.

WILLIAMS' CASE.

UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT, 1797.

(*Wharton's State Trials*, 652.)[1]

On the trial, it was admitted on the part of Williams, that he had committed the facts alleged against him in the indictment, but, in his defence, he offered to prove that, in the year 1792, he received from the Consul-General of the French Republic, a warrant, appointing him third lieutenant on board the *Jupiter*, a French seventy-four gun ship; that, pursuant to this appointment, he went on board the *Jupiter*, and took the command to which he was appointed; that the *Jupiter* soon after sailed for France, and arrived at Rochefort, in France, in the autumn of the same year; that at Rochefort he was duly naturalized in the various Bureaux in that place, the same autumn, renouncing his allegiance to all other countries, particularly to America, and taking an oath of allegiance to the Republic of France, all according to the laws of said republic; that immediately after said naturalization he was duly commissioned by the Republic of France appointing him a second lieutenant on board a French frigate called the *Charont;* and that before the ratification of the treaty of amity and commerce between the United States and Great Britain, he was duly commissioned by the French Republic a second lieutenant on board a seventy-four gun ship, in the service of said republic; and that he has ever continued under the government of the French Republic down to the present time, and the most of said time actually resident in the dominions of the French Republic; that during said period he was not resident in the United States more than six months, which was in the year 1796, when he came to this country for the purpose merely of visiting his relations and friends; that, for about three years past, he has been domiciliated in the island of Guadaloupe, within the dominions of the French Republic, and has made that place his fixed habitation, without any design of again returning to the United States for permanent residence. The attorney for the district conceded the above-mentioned statement to be true; but objected that it ought not to be admitted as evidence to the jury, because it could have no operation in law to justify the prisoner in committing the facts alleged against him in the indictment. This

[1] Reported less fully in 2 Cranch, 83, note a. — ED.

question was argued on both sides by Mr. Pierpont Edwards for the United States, and Mr. David Daggett for the prisoner.

Judge Law (district judge) expressed doubts as to the legal operation of the evidence; and gave it as his opinion, that the evidence, and the operation of law thereon, be left to the consideration of the jury.

Judge Ellsworth, the Chief Justice of the United States, stated his views nearly in the following language:

The common law of this country remains the same as it was before the Revolution. The present question is to be decided by two great principles; one is, that all the members of civil community are bound to each other by compact. The other is, that one of the parties to this compact cannot dissolve it by his own act. The compact between our community and its members is, that the community will protect its members; and on the part of the members, that they will at all times be obedient to the laws of the community, and faithful in its defence. This compact distinguishes our government from those which are founded in violence or fraud. It necessarily results, that the members cannot dissolve this compact, without the consent or default of the community. There has been here no consent — no default. Default is not pretended. Express consent is not claimed; but it has been argued, that the consent of the community is implied by its policy — its conditions, and its acts.

In countries so crowded with inhabitants that the means of subsistence are difficult to be obtained, it is reason and policy to permit emigration. But our policy is different; for our country is but sparsely settled, and we have no inhabitants to spare.

Consent has been argued from the condition of the country; because we were in a state of peace. But though we were in peace the war had commenced in Europe. We wished to have nothing to do with the war; but the war would have something to do with us. It has been extremely difficult for us to keep out of this war; the progress of it has threatened to involve us. It has been necessary for our government to be vigilant in restraining our own citizens from those acts which would involve us in hostilities. The most visionary writers on this subject do not contend for the principle in the unlimited extent, that a citizen may at any and at all times renounce his own and join himself to a foreign country. Consent has been argued from the acts of our own government, permitting the naturalization of foreigners. When a foreigner presents himself here, and proves himself to be of a good moral character, well affected to the Constitution and Government of the United States, and a friend to the good order and happiness of civil society, if he has resided here

the time prescribed by law, we grant him the privilege of a citizen. We do not inquire what his relation is to his own country; we have not the means of knowing, and the inquiry would be indelicate; we leave him to judge of that. If he embarrasses himself by contracting contradictory obligations, the fault and the folly are his own. But this implies no consent of the government, that our own citizens should expatriate themselves. Therefore, it is my opinion that these facts which the prisoner offers to prove in his defence, are totally irrelevant; they can have no operation in law; and the jury ought not to be embarrassed or troubled with them; but by the constitution of the court the evidence must go to the jury.

The prisoner was accordingly found guilty, fined and imprisoned.[1]

[1] See very learned note in which Dr. Wharton traces the doctrine from its promulgation in *Williams' Case*, and its fluctuations until its final recognition. "At last in *Shanks* v. *Dupont*, 1830 (3 Pet. 242), the long circuit of doubts and reservations was closed, and the court found itself back again at the position of *Williams' Case*, that allegiance without mutual consent is indissoluble."

From the "historical review of the principal discussions in the Federal courts on this interesting subject in American jurisprudence, the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States without the permission of Government, to be declared by law; and that, as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered." 2 Kent's Commentaries, p. 60.

Proclamation of the Prince Regent, July 24, 1814, Cockburn's Nationality, 77:—

"A proclamation by the Prince Regent, of the 24th July, especially directed against America, after prohibiting all natural-born subjects of His Majesty from serving in the ships and armies of the United States, and charging all such persons at once to quit such service, proceeds as follows:

"And whereas it has been further represented to us that divers of our natural-born subjects as aforesaid have been induced to accept Letters of Naturalization or Certificates of Citizenship from the said United States of America, vainly supposing that by such letters or certificates they are discharged from that duty and allegiance which, as our natural-born subjects, they owe to us: Now we do hereby warn all such our natural-born subjects, that no such Letters of Naturalization or Certificates of Citizenship do, or can, in any manner discharge our natural-born subjects of the allegiance, or in any degree alter the duty which they owe to us, their natural sovereign. . . .

"Moreover, that all such, our subjects, as aforesaid, who have voluntarily entered, or shall enter, or voluntarily continue to serve on board of any such ships of war, or in the land forces of the said United States of America, at enmity with us, are, and will be, guilty of high treason." — Ed.

AN ACT CONCERNING AMERICAN CITIZENS IN FOREIGN STATES, JULY 27, 1868.

"Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any declaration, instruction, opinion, order, or decision of any officers of this Government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this Government.

"SEC. 2. *And be it further enacted*, That all naturalized citizens of the United States, while in foreign states, shall be entitled to and shall receive from this Government, the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances.

"SEC. 3. *And be it further enacted*, That whenever it shall be made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons for such imprisonment, and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, it shall be the duty of the President to use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate such release, and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."[1]

[1] "I invite the earnest attention of Congress to the existing laws of the United States respecting expatriation and the election of nationality by individuals.

"Many citizens of the United States reside permanently abroad with their families. Under the provisions of the act approved February 10, 1855, the children of such persons are to be deemed and taken to be citizens of the United States, but the rights

SECTION 21. — CITIZENSHIP — NATURALIZATION.

HAWLEY, DISTRICT JUDGE, IN BLAIR v. SILVER PEAK MINES ET AL., 1899.

(93 *Federal*, 332, 335.)

The general rule is well settled that a citizen is one who owes the government allegiance, service, and money by way of taxation, and to whom the government in turn grants and guarantees liberty of person and of conscience, the right of acquiring and possessing property,

of citizenship are not to descend to persons whose fathers never resided in the United States.

"It thus happens that persons who have never resided within the United States have been enabled to put forward a pretension to the protection of the United States against the claim to military service of the government under whose protection they were born and have been reared. In some cases even naturalized citizens of the United States have returned to the land of their birth, with intent to remain there, and their children, the issue of a marriage contracted there after return, and who have never been in the United States, have laid claim to our protection, when the lapse of many years had imposed upon them the duty of military service to the only government which had ever known them personally.

"Until the year 1868 it was left embarrassed by conflicting opinions of courts and of jurists to determine how far the doctrine of perpetual allegiance derived from our former colonial relations with Great Britain was applicable to American citizens. Congress then wisely swept these doubts away by enacting that 'any declaration, instruction, opinion, order, or decision of any officer of this government which denies, restricts, impairs, or questions the right of expatriation, is inconsistent with the fundamental principles of this government.' But Congress did not indicate in that statute, nor has it since done so, what acts are deemed to work expatriation. For my own guidance in determining such questions, I required (under the provisions of the Constitution) the opinion in writing of the principal officer in each of the executive departments upon certain questions relating to this subject. The result satisfies me that further legislation has become necessary. I therefore commend the subject to the careful consideration of Congress, and I transmit herewith copies of the several opinions of the principal officers of the executive department, together with other correspondence and pertinent information on the same subject.

"The United States, who led the way in the overthrow of the feudal doctrine of perpetual allegiance, are among the last to indicate how their own citizens may elect another nationality. The papers submitted herewith indicate what is necessary to place us on a par with other leading nations in liberality of legislation on this international question. We have already in our treaties assented to the principles which would need to be embodied in laws intended to accomplish such results. We have agreed that citizens of the United States may cease to be citizens, and may voluntarily render allegiance to other powers. We have agreed that residence in a foreign land,

of suit and of defence, and security in person, estate, and reputation. *Knox* v. *Greenleaf*, 4 Dall. 360; *Gassies* v. *Ballon*, 6 Pet. 761; *Shelton* v. *Tiffin*, 6 How. 163, 185; *Sheppard* v. *Graves*, 14 How. 512, 513; *Minor* v. *Happersett*, 21 Wall. 162, 166; *U. S.* v. *Cruikshank*, 92 U. S. 542; *Anderson* v. *Watt*, 138 U. S. 695, 706, 11 Sup. Ct. 449; *Boyd* v. *Nebraska*, 143 U. S. 135, 159, 12 Sup. Ct. 375; *Gordon* v. *Bank*, 144 U. S. 97, 103, 12 Sup. Ct. 657; *Marks* v. *Marks*, 75 Fed. 321. It is also well settled that a state may deny all her political rights to an individual, and he yet be a citizen. The right of office and suffrage are political purely. A citizen enjoys civil rights. Id.

without intent to return, shall of itself work expatriation. We have agreed in some instances upon the length of time necessary for such continued residence to work a presumption of such intent. I invite Congress now to mark out and define when and how expatriation can be accomplished; to regulate by law the condition of American women marrying foreigners; to fix the status of children born in a foreign country of American parents residing more or less permanently abroad, and to make rules for determining such other kindred points as may seem best to Congress." President Grant's Fifth Annual Message, 7 Richardson's Messages and Papers, 239-240.

An Act concerning Aliens and British Subjects, May 12, 1870. Extract: — "4. Any person who by reason of his having been born within the dominions of Her Majesty is a natural-born subject, but who also at the time of his birth became, under the law of any foreign state, a subject of such state, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject. 5. From and after the passing of this act an alien shall not be entitled to be tried by a jury *de medietate linguæ*, but shall be triable in the same manner as if he were a natural-born subject. "6. Any British subject who has at any time before, or may at any time after, the passing of this act, when in any foreign state and not under any disability, voluntarily become naturalized in such state, shall, from and after the time of his so having become naturalized in such foreign state, be deemed to have ceased to be a British subject and be regarded as an alien;" &c.

In France it is likewise held that French nationality is lost by naturalization in a foreign state. Alibert's case, 1852, Report on Naturalization, United States, p. 133.

In the excellent case of Michael Zeiter, 1869, before the court of first instance of Wissembourg, the question was whether he was exempt from military service. And this depended upon whether he was a citizen of France, for, by the 2d article of the law of March 21, 1832, as the court say, "nul ne peut être admis dans les troupes françaises s'il n'est français."

Zeiter contended that he had been naturalized in the United States, and had thereby lost his French nationality. The court assented to this view of the law, but demanded further proof of his naturalization in America. When he had procured satisfactory proofs, the court decreed as follows:

"Attendu que, par la production du certificat qui lui a été delivré le vingt-huit mai dernier, par le consul des États Unis à Paris, et qui a été enregistré à Wissembourg aujourd'hui, le demandeur a justifié qu'il est citoyen américain: le tribunal donne acte au demandeur de ce que, par la production du dit certificat, il a satisfait au jugement rendu en ce siége le vingt-cinq avril dernier.

"En conséquence dit et reconnait que le demandeur, Michel Zeiter, par sa naturalisation en pays étranger, a perdu la qualité de français." — Ed.

328; *Burnham* v. *Rangeley*, 1 Woodb. & M. 7, Fed. Cas. No. 2176; *Catlett* v. *Insurance Co.*, 1 Paine, 594, Fed. Cas. No. 2517; *Minor* v. *Happersett*, 21 Wall. 162; *Blanck* v. *Pausch*, 113 Ill. 60, 64; *State* v. *Fairlamb*, 121 Mo. 138, 150, 25 S. W. 895."

LITTELL v. ERIE R. R. CO.

UNITED STATES CIRCUIT COURT, S. D. NEW YORK, 1900.

(105 *Federal*, 539.)

WHEELER, District Judge. Jurisdiction of this case depends upon citizenship. The complaint alleges "that the plaintiff now is, and at all times hereinafter mentioned was, a citizen of the United States, and an actual resident of the State of New Jersey." The defendant has demurred, assigning this to be an insufficient allegation of citizenship in New Jersey. But citizens of the United States residing in any of the States are citizens of those States. *Gassies* v. *Ballon*, 6 Pet. 761, 8 L. Ed. 573; *Dred Scott* v. *Sandford*, 19 How. 393, 15 L. Ed. 691; *Boyd* v. *Nebraska*, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103. This allegation is, therefore, a full equivalent of what a direct one would be that the plaintiff is a citizen of New Jersey. In the cases cited in support of the demurrer there does not appear to have been any such allegation relating to citizenship of the party in question as this. *Robertson* v. *Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Insurance Co.* v. *Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380; *Menard* v. *Goggan*, 121 U. S. 253, 7 Sup. Ct. 873, 30 L. Ed. 914; *Wolfe* v. *Insurance Co.*, 148 U. S. 389, 13 Sup. Ct. 602, 37 L. Ed. 493; *Horne* v. *George H. Hammond Co.*, 155 U. S. 393, 15 Sup. Ct. 167, 39 L. Ed. 197; *Cooper* v. *Newell*, 155 U. S. 532, 15 Sup. Ct. 355, 39 L. Ed. 249. Such a one was held to be sufficient in *Gassies* v. *Ballon*, and was so recognized in *Dred Scott* v. *Sandford*, which have not been either expressly or impliedly overruled as to this. Demurrer overruled.[1]

[1] On the privileges of citizens of State in another State of the Union, see note, 1 Lawyer's Rep. Ann. 56, and as to privileges of citizens in general, see note, 14 L. R. A. 579–586. See also the elaborate list of authorities on Rights of Citizens, in A. B. Hart, Handbook of History, Diplomacy, Government, 1901, pp. 146–149. — ED.

Ex Parte CHIN KING.

Ex Parte CHAN SAN HEE.

UNITED STATES CIRCUIT COURT FOR OREGON, 1888.

(35 *Federal*, 354.)

Application for writ of *habeas corpus*.

DEADY, J.—"The writ of *habeas corpus* in these cases was allowed and issued on June 25, 1888, and they were heard together on the same day.

"The petition of Chin King states that she was born in San Francisco, Cal., on October 10, 1868; while that of Chan San Hee states that she was born in Portland, Or., on March 15, 1878; and they each state that they are restrained of their liberty by William Robert Laird, the master of the British bark 'Kitty,' because the collector of customs for this port refuses to allow them to land from said bark on the ground that the petitioners are Chinese, and have no return certificate, as required by the act of Congress on that subject; but they aver that they are native-born citizens of the United States and therefore not included within the terms of said act.

"The return of the master to each writ states that the 'Kitty' sailed from Hong Kong for Portland, on April 19, 1888, and that the petitioners were passengers thereon during said voyage, and are now in custody on board the same, for the reasons stated in the petitions.

"On application the United States district attorney was allowed to intervene on behalf of the United States, and allege that he had no knowledge or information sufficient to form a belief, as to whether the petitioners were born in the United States, as alleged, or not.

"On the hearing it appeared that Chung Yip Gen is a Chinese merchant, who has lived and done business in this city for the past 13 years and for 12 years prior thereto in San Francisco; that he was married in San Francisco about 23 years ago, and the petitioners are his daughters, the older one having been born in San Francisco, and the younger one in Portland, and that in 1881 the father sent them and their mother to China, from whence they were to return when they pleased.

"By the common law, a child born within the allegiance—the jurisdiction—of the United States, is born a subject or citizen thereof, without reference to the political *status* or condition of its parents. *McKay* v. *Campbell*, 2 Sawy., 118; *In re Look Tin Sing*, 10 Sawy., 353;

21 Fed. Rep., 905; *Lynch* v. *Clarke*, 1 Sandf. Ch., 583. In the latter case it was held that Julia Lynch, who was born in New York in 1849, of alien parents during a temporary sojourn by them in that city, and returned with them the same year to their native country, where she resided until her death, was an American citizen.

"The vice-chancellor, after an exhaustive examination of the law, declared that every citizen born within the dominion and allegiance of the United States was a citizen thereof, without reference to the situation of his parents.

"This, of course, does not include the children born in the United States of parents engaged in the diplomatic service of foreign governments, whose residence, in contemplation of public law, is a part of their own country.

"The rule of the common law on this subject has been incorporated into the fundamental law of the land.

"The fourteenth amendment declares: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside.'

"In *In re Look Tin Sing*, 10 Sawy., 353; 21 Fed. Rep., 905, it was held that a person born within the United States, of Chinese parents, not engaged in any diplomatic or official capacity under the emperor of China, is a citizen of the United States. The case is similar to that of the petitioners. The party in question was born in California in 1870, of Chinese parents. In 1879, he went to China, and returned to California in 1884, without the certificate provided for in the restriction act of 1882, or that of 1884, and was therefore denied the right to land.

"Mr. Justice Field, in delivering the opinion of the court, in which Sawyer, Sabin, and Hoffman concurred, says (p. 359): 'The inability of persons to become citizens under those laws (of naturalization) in no respect impairs the effect of their birth, or of the birth of their children, upon the *status* of either, as citizens of the United States.'

"The only point made by the district attorney against the petitioners on the question of their citizenship is that they left this country without, as he claims, any definite or fixed purpose to return.

"But I think the evidence does not warrant so strong a statement. For aught that appears they intended to return; and the fact that they have returned gives strength to the inference. The most that can be said is, there was no time fixed for their return. And that is the case with hundreds of minor American citizens, who go abroad yearly for nurture and education. But it seems that the citizenship

of the petitioners would not be affected by the fact, if they had never come back, unless it also appears that they had in some formal and affirmative way renounced the same.

"However, in my judgment, a father cannot deprive his minor child of the *status* of American citizenship, impressed upon it by the circumstances of its birth under the Constitution and within the jurisdiction of the United States.

"This *status*, once acquired, can only be lost or changed by the act of the party when arrived at majority, and the consent of the government.

"By section 2 of article 4 of the Constitution it is provided: 'The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'

"It has always been held that the privileges and immunities there referred to are fundamental; and that a citizen of one state may at least, under this provision, pass through or reside in any other state of the union for the ordinary pursuits or purposes of life. *Corfield* v. *Coryell*, 4 Wash. C. C., 380; *Paul* v. *Virginia*, 8 Wall., 180.

"The action of the collector in these cases has the effect, and is so intended, to deny these citizens of the United States the right of free locomotion within the same,—the right to come into, pass through, or reside in this state, and is therefore contrary to and in violation of the constitutional provision guaranteeing such right to every citizen. Sections 751, 752, and 753 of the Revised Statutes provide, in effect, that the courts of the United States and the judges thereof shall have power, by *habeas corpus*, to deliver a person held in custody or restrained of his liberty in violation of the Constitution or of a law or treaty of the United States.

"The petitioners, as we have seen, are restrained of their liberty in violation of the Constitution, and therefore this court has jurisdiction to discharge them on *habeas corpus*.

"The petitioners are discharged from custody." [1]

[1] In *U. S.* v. *Wong Kim Ark*, 1898, 169 U. S. 649, Mr. Justice Gray, in delivering the judgment of the court, gives an exhaustive survey of citizenship by birth in the United States. Authorities are cited in great fulness, and reference is made in the case to the most recent as well as the most authoritative decisions on the subject in the United States, England, and the Continent.

In a note on this case in 12 Harvard Law Review, 55, the following apt résumé is given: "Citizenship is a question not of international but of municipal law. The division of the law of citizenship into the *jus sanguinis* and the *jus soli* is a deduction from the division of the jurisdiction of a state into the personal and the territorial. In the civil law, citizenship is by descent. At common law, all those born within the kingdom or legeance of the Crown were held subjects; and if the United States have a common law this ancient rule governs. *Calvin's Case*, 7 Rep. 1. Whatever abstract

FONG YUE TING v. UNITED STATES.

WONG QUAN v. UNITED STATES.

LEE JOE v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES, 1892.

(149 *United States*, 698.)

Mr. Justice GRAY delivered the opinion of the court.[1]

The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this court, and by the authorities therein referred to.

In the recent case of *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659, the court, in sustaining the action of the executive department, putting in force an act of Congress for the exclusion of aliens,

rules there may be, the right of every sovereignty to determine for itself by its own laws who are its citizens is a fundamental one. By the Fourteenth Amendment of the United States Constitution, "All persons born or naturalized within the United States are citizens;" the exception is that those not born "subject to jurisdiction thereof" are not citizens. Are the children of aliens within the exception? When within our territory, the sovereigns, diplomats, sailors upon ships of war, and soldiers in the organized military forces of a foreign state, are not subject to our jurisdiction. Children born of parents under these circumstances of extraterritoriality would not be citizens. The same is true of the children of tribal Indians. The logic of these exceptions of sovereignty, however, does not apply to the alien subject domiciled in the United States. He is subject to the territorial jurisdiction; his children are born subject to our jurisdiction; and these, by our municipal law, are citizens. Accordingly, the decision reached by the Supreme Court seems to have sanction of authority, policy, and theory.

"The case further presents a phase of the conflict of laws not often considered. The objection to the doctrine of the majority opinion has been taken by very high authorities, that as our law provides no right of election by or for a child, as do the Continental codes, a dual allegiance will result, and this is urged to be contrary to the theory of citizenship. This difficulty, however, is apparent rather than real. When a child is born in America of Chinese parents, China claims him by the *jus sanguinis*, America by the *jus soli*. It is not a question whether he is an American or a Chinaman; he is both. The municipal laws being thus in conflict, his citizenship at any time will depend upon whether he is subject to the jurisdiction of the one or of the other country. The duality of citizenship is a fact only in a third country. In China he is a Chinaman; in America, an American." — ED.

[1] In this case the question before the court was as to the validity of a statute (act of May 5, 1892, c. 60), requiring the registration of Chinese laborers within the U. S. who were entitled by the existing law to remain and the expulsion of those not registered.— ED.

said: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress."

The same views were more fully expounded in the earlier case of *Chae Chan Ping* v. *United States*, 130 U. S. 581, in which the validity of a former act of Congress, excluding Chinese laborers from the United States, under the circumstances therein stated, was affirmed.

In the elaborate opinion delivered by Mr. Justice Field, in behalf of the court, it was said: "Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." "The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." 130 U. S. 603, 604.

It was also said, repeating the language of Mr. Justice Bradley in *Knox* v. *Lee*, 12 Wall. 457, 555: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the State governments." 130 U. S. 605. And it was added: "For local interests the several States of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." 130 U. S. 606.

The court then went on to say: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other

considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases, its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy. The power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments." 130 U. S. 606, 607. This statement was supported by many citations from the diplomatic correspondence of successive Secretaries of State collected in Wharton's International Law Digest, § 206.

The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

This is clearly affirmed in despatches referred to by the court in *Chae Chan Ping's Case*. In 1856, Mr. Marcy wrote: "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798." In 1869, Mr. Fish wrote: "The control of the people within its limits, and the right to expel from its territory persons who are

dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested." Wharton's International Law Digest, § 206; 130 U. S. 607.

The statements of leading commentators on the law of nations are to the same effect.

Vattel says: "Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. What it owes to itself, the care of its own safety, gives it this right; and in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner." "Thus, also, it has a right to send them elsewhere, if it has just cause to fear that they will corrupt the manners of the citizens; that they will create religious disturbances, or occasion any other disorder, contrary to the public safety. In a word, it has a right, and is even obliged, in this respect, to follow the rules which prudence dictates." Vattel's Law of Nations, lib. 1, c. 19, §§ 230, 231.

Ortolan says: "The government of each state has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation. The exercise of this right may be subjected, doubtless, to certain forms by the domestic laws of each country; but the right exists none the less, universally recognized and put in force. In France, no special form is now prescribed in this matter; the exercise of this right of expulsion is wholly left to the executive power." Ortolan, Diplomatie de la Mer, lib. 2, c. 14 (4th ed.), p. 297.

Phillimore says: "It is a received maxim of international law, that the government of a state may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it." 1 Phillimore's International Law (3d ed.), c. 10, § 220.

Bar says: "Banishment and extradition must not be confounded. The former is simply a question of expediency and humanity, since no state is bound to receive all foreigners, although, perhaps, to exclude all would be to say good-by to the international union of all civilized states; and although in some states, such as England, strangers can only be expelled by means of special acts of the legislative power, no state has renounced its right to expel them, as is

shown by the alien bills which the government of England has at times used to invest itself with the right of expulsion." "Banishment is regulated by rules of expediency and humanity, and is a matter for the police of the state. No doubt the police can apprehend any foreigner who refuses to quit the country in spite of authoritative orders to do so, and convey him to the frontier." Bar's International Law (Gillespie's ed. 1883), 708 note, 711.

In the passages just quoted from Gillespie's translation of Bar, "banishment" is evidently used in the sense of expulsion or deportation by the political authority on the ground of expediency, and not in the sense of transportation or exile by way of punishment for crime. Strictly speaking, "transportation," "extradition" and "deportation," although each has the effect of removing a person from the country, are different things, and have different purposes. "Transportation" is by way of punishment of one convicted of an offence against the laws of the country. "Extradition" is the surrender to another country of one accused of an offence against its laws, there to be tried, and, if found guilty, punished. "Deportation" is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken.

In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the King without the consent of Parliament. It was formerly exercised by the King, but in later times by Parliament, which passed several acts on the subject between 1793 and 1848. 2 Inst. 57; 1 Chalmers Opinions, 26; 1 Bl. Com. 260; Chitty on the Prerogative, 49; 1 Phillimore, c. 10, § 220 and note; 30 Parl. Hist. 157, 167, 188, 217, 229; 34 Hansard Parl. Deb. (1st series) 441, 445, 471, 1065–1071; 6 Law Quart. Rev. 27.

Eminent English judges, sitting in the Judicial Committee of the Privy Council, have gone very far in supporting the exclusion or expulsion, by the executive authority of a colony, of aliens having no absolute right to enter its territory or to remain therein.

In 1837, in a case arising in the Island of Mauritius, which had been conquered by Great Britain from France in 1810, and in which the law of France continued in force, Lord Lyndhurst, Lord Brougham and Justices Bosanquet and Erskine, although considering it a case of great hardship, sustained the validity of an order of the English governor, deporting a friendly alien who had long resided and carried on business in the island, and had enjoyed the privileges and exercised

the rights of a person duly domiciled, but who had not, as required by the French law, obtained from the colonial government formal and express authority to establish a domicil there. *In re Adam*, 1 Moore P. C. 460.

In a recent appeal from a judgment of the Supreme Court of the Colony of Victoria, a collector of customs, sued by a Chinese immigrant for preventing him from landing in the colony, had pleaded a justification under the order of a colonial minister claiming to exercise an alleged prerogative of the Crown to exclude alien friends, and denied the right of a court of law to examine his action, on the ground that what he had done was an act of state; and the plaintiff had demurred to the plea. Lord Chancellor Halsbury, speaking for himself, for Lord Herschell (now Lord Chancellor) and for other lords, after deciding against the plaintiff on a question of statutory construction, took occasion to observe: "The facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native; but it is quite another thing to assert that an alien, excluded from any part of her Majesty's dominions by the executive government there, can maintain an action in a British court, and raise such questions as were argued before their lordships on the present appeal — whether the proper officer for giving or refusing access to the country has been duly authorized by his own colonial government, whether the colonial government has received sufficient delegated authority from the Crown to exercise the authority which the Crown had a right to exercise through the colonial government if properly communicated to it, and whether the Crown has the right without parliamentary authority to exclude an alien. Their lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies. When once it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory, their lordships are of opinion that it would be impossible, upon the facts which the demurrer admits, for an alien to maintain

an action." *Musgrove* v. *Chun Teeong Toy*, App. Cas. (1891), 272, 282, 283.

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the act of 1892 is consistent with the Constitution.

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States.

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

In view of that decision [*Chae Chan Ping* v. *U. S.*, 1888, 581], which, as before observed, was a unanimous judgment of the court, and which had the concurrence of all the justices who had delivered opinions in the cases arising under the acts of 1882 and 1884, it appears to be impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of Congress, any right, as a denizen or otherwise, to be and remain in this country, except by the license, permission and sufferance of Congress, to be withdrawn whenever, in its opinion, the public welfare might require it.

By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicil there; and, while they are permitted by the nation to retain such a residence and domicil, are subject to its laws, and may invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to expel any or all aliens at its pleasure. Vattel, lib. 1, c. 19, § 213; 1 Phillimore, c. 18, § 321; Mr. Marcy, in *Koszta's Case*, Wharton's International Law Digest, § 198. See, also, *Lau Ow Bew* v. *United States*, 144 U. S. 47, 62; Merlin, Repertoire de Jurisprudence, Domicile, § 13, quoted in the case, above cited, of *In re Adam*, 1 Moore P. C. 460, 472, 473.

Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest.

Nothing inconsistent with these views was decided or suggested by the court in *Chy Lung* v. *Freeman*, 92 U. S. 275, or in *Yick Wo* v. *Hopkins*, 118 U. S. 356, cited for the appellants.

In *Chy Lung* v. *Freeman*, a statute of the State of California, restricting the immigration of Chinese persons, was held to be unconstitutional and void, because it contravened the grant in the Constitution to Congress of the power to regulate commerce with foreign nations.

In *Yick Wo* v. *Hopkins*, the point decided was that the Fourteenth Amendment of the Constitution of the United States, forbidding any State to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, was violated by a municipal ordinance of San Francisco, which conferred upon the board of supervisors arbitrary power, without regard to competency of persons or to fitness of places, to grant or refuse licenses to carry on public laundries, and which was executed by the supervisors by refusing licenses to all Chinese residents, and granting them to other persons under like circumstances. The question there was of the power of a State over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country.

Upon careful consideration of the subject, the only conclusion which appears to us to be consistent with the principles of international law, with the Constitution and laws of the United States, and with the previous decisions of this court, is that in each of these cases the judgment of the circuit court, dismissing the writ of *habeas corpus*, is right and must be. Affirmed.[1]

[1] Dissenting opinion of Mr. Justice Brewer omitted. — Ed.

CITY OF MINNEAPOLIS v. REUM.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, 1893.

(56 *Federal*, 576.)

SANBORN, Circuit Judge. In *Lanz* v. *Randall*, 4 Dill. 425, Mr. Justice Miller, who was then presiding in the Circuit Court for the District of Minnesota, held that a State could not make the subject of a foreign government a citizen of the United States, and that a resident of Minnesota who was born a subject of the Grand Duke of Mecklenburg, had declared his intention to become a citizen of the United States many years before he brought his suit, had resided in the State of Minnesota for fifteen years, had several times voted at elections held in that State where the constitution of the State authorizes such residents to do so without naturalization, but had never applied to be or been admitted to citizenship under the Federal naturalization laws, was still an alien, and a subject of the Grand Duke of Mecklenburg. This decision has been followed by the courts, and acquiesced in by the profession. It is now vigorously challenged by counsel for plaintiff in error.

Section 2, art. 3, of the Constitution of the United States, provides that the judicial power of the nation shall extend to "controversies between a State or the citizens thereof and foreign states, citizens, or subjects;" and the acts of Congress of March 3, 1887 (24 Stat. 552), and of August 13, 1888 (25 Stat. 433), confer jurisdiction of all these controversies in cases involving over $2,000 upon the circuit courts. Every person at his birth is presumptively a citizen or subject of the state of his nativity, and where, as in the case at bar, his parents were then both subjects of that state, the presumption is conclusive. To the land of his birth he owes support and allegiance, and from it he is entitled to the civil and political rights and privileges of a citizen or subject. This relation, imposed by birth, is presumed to continue until a change of nationality is proved. *Minor* v. *Happersett*, 21 Wall. 162, 167; Vatt. Law Nat. p. 101; Morse. Nat. 61, 125. A change of nationality cannot be made by the individual at will. Each nation has the right to refuse to grant the rights and privileges of citizenship to all persons not born upon its soil, and, if it determines to admit them to those rights and privileges, it may fix the terms on which they shall be conferred upon them. Naturalization is the admission of a foreign subject or citizen into the political body

of a nation, and the bestowal upon him of the quality of a citizen or subject.

The Fourteenth Amendment to the Constitution of the United States provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As the plaintiff was born in the kingdom of Saxony, of parents who at the time of his birth were subjects of the King of Saxony, he is not a citizen of the United States unless he has been naturalized therein. The United States, in the exercise of their undoubted right, have prescribed the conditions upon compliance with which an alien may become a citizen of this nation. The act of Congress of April 14, 1802 (2 Stat. 153, c. 28, § 1; Rev. St. § 2165), provides that "an alien may be admitted to become a citizen of the United States in the following manner, and not otherwise. First. He shall, two years at least prior to his admission, declare before a proper court his intention to become a citizen of the United States, and to renounce his allegiance to the potentate or sovereignty of which he may be at the time a citizen or subject. Second. He shall, at the time of his application to be admitted, declare, on oath, before some one of the courts above specified, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty; and particularly, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject, which proceedings shall be recorded by the clerk of the court. Third. It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of a good, moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence."

By the act of May 26, 1824 (4 Stat. 69, c. 186, § 1; Rev. St. § 2167), it is provided that:

"Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having

made the declaration required in the first condition of section twenty-one hundred and sixty-five; but such alien shall make the declaration required therein at the time of his admission, and shall further declare on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his *bona fide* intention to become a citizen of the United States; and he shall in all other respects comply with the laws in regard to naturalization."

There is no other provision of the acts of Congress under which this plaintiff could have been naturalized. The counsel for plaintiff in error, however, alleges that he became a citizen of the United States (1) because at the time he declared his intention to do so he might have been admitted to citizenship, under the provisions of section 2167; (2) because various acts of Congress have conferred certain privileges, and some have conferred all the privileges, of a citizen upon foreign-born residents who had declared their intention to become citizens; and (3) because the State of Minnesota has granted to such residents practically all the privileges of citizenship in its power to bestow.

Before this plaintiff could become a naturalized citizen, the contract of allegiance and protection that the relation of a citizen to his nation implies must be made between him and the United States. The United States have prescribed the conditions under which such an alien may make this contract, the place where, and the manner in which, it shall be made, and have declared that it can be made on those conditions, and in that manner, and not otherwise. Rev. St. § 2165. The conditions are that he shall declare, on oath, that he will support the Constitution; that he does renounce all allegiance to every foreign prince, potentate, state, or sovereignty, and particularly to that one of which he was a subject; that it shall be made to appear to the court that he has resided in the United States five years, and in the State where the court is held one year; that he has behaved as a man of good moral character during all of this time, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. The place where these conditions must be complied with is in one of the courts of record named in the acts of Congress, and the method by which the contract is to be made is by plenary proof to that court of a compliance with these conditions, which must be evidenced by its judgment. The plaintiff has complied with none of these terms. He has not even applied to any court to be admitted to citizenship. He has not consented to become a citizen of the United States on the terms they offer to him, or on any terms, but he still insists he is not a citizen, and that he is still a subject of the King of Saxony. On the other hand, the United States have not consented

to accept the plaintiff as a citizen, on any terms, much less to waive all the essential conditions without a compliance with which Congress has declared an alien cannot be naturalized. The minds of both parties must meet to make a contract, and, where neither party consents, there can surely be no agreement.

That the plaintiff, on Oct. 25, 1890, had resided in Minnesota, as boy and man, long enough to qualify him to become a citizen under section 2167, is not material. The conclusive answer to the argument here urged is that the declaration of an intention to enter into a new relation for which parties are qualified does not establish the relation. A man and woman who declare their intention to be married at some future time do not thereby become husband and wife. On the other hand, a declaration of an intention to enter into a relation or to do an act at some future time is very persuasive evidence that the relation was not entered upon, and the act was not done, at the time the declaration was made. It must be borne in mind that the only effect of section 2167 was to relieve the plaintiff from waiting two years after filing his declaration before being admitted to citizenship. That section expressly provides that in all other respects he shall comply with the laws in regard to naturalization. The plaintiff's declaration on October 25, 1890, when he was qualified to be naturalized, that he intended at some future time to become a citizen, coupled with the fact that he did not then apply to be admitted to citizenship, nor comply with any of the conditions prescribed by law for his naturalization, compels the conclusion that he did not then denationalize himself, but that he still remained a foreign subject.

That Congress, in various acts, has conferred certain privileges and imposed certain burdens upon "persons of foreign birth who shall have declared their intention to become citizens," at the same time that it conferred like privileges or imposed like burdens upon our own citizens, as in the act of March 3, 1863, (12 Stat. 731,) where all able-bodied male citizens of the United States, and "persons of foreign birth who shall have declared their intention to become citizens under and in pursuance of the laws thereof," between certain ages, are declared to constitute the national forces, and as in the patent laws (Rev. St. § 4904), the pre-emption laws (id. § 2259), and in the mining laws (id. § 2289), where certain privileges are conferred on citizens of the United States, and "those who have declared their intention to become such," in no way militates against, but strongly supports, the correctness of our conclusion, because, if foreign-born residents, by declaring their intention to become citizens, could *ipso facto* become such, it would have been futile to name them in all of these acts as a class distinct from our citizens. That Congress has, by various special

acts, many of which are referred to in the opinion of Chief Justice Fuller in *Boyd* v. *Nebraska*, 143 U. S. 158, 12 Sup. Ct. Rep. 375, naturalized certain classes of persons who had not complied with the terms of the general laws on this subject, is not important here, because the plaintiff is not a member of any class thus naturalized. Nor is the decision in *Boyd* v. *Nebraska, supra*, in point in this case, because Governor Boyd was there held to be one of a class of foreign-born residents that was naturalized by the acts of Congress admitting the State of Nebraska into the Union. These acts conferred the rights of citizenship upon foreign-born residents of Nebraska who had declared their intention to become citizens. The plaintiff was a resident of Minnesota.

A single argument remains to be noticed, and that is that the State of Minnesota has conferred on plaintiff the elective franchise, the right to hold any office in its gift, and, in reality, all the rights and privileges of citizenship in its power to bestow; and therefore it is said he is a citizen of that State, and not a foreign subject, and the Federal court has no jurisdiction of this action. It may be conceded that a State may confer on foreign citizens or subjects all the rights and privileges it has the power to bestow, but, when it has done all this, it has not naturalized them. They are foreign citizens or subjects still, within the meaning of the Constitution and laws of the United States, and the jurisdiction of the Federal courts over controversies between them and citizens of the States is neither enlarged nor restricted by the acts of the State. The power to naturalize foreign subjects or citizens was one of the powers expressly granted by the States to the national government. By section 8, art. 1, of the Constitution of the United States, it was provided that "the Congress shall have the power to establish a uniform rule of naturalization." Congress has exercised this power, established the rule, and expressly declared that foreign-born residents may be naturalized by a compliance with it, and not otherwise. This power, like the power to regulate commerce among the States, was carved out of the general sovereign power held by the States when this nation was formed and granted by the Constitution to the Congress of the United States. It thus vested exclusively in Congress, and no power remained in the States to change or vary the rule of naturalization Congress established, or to authorize any foreign subject to denationalize himself, and become a citizen of the United States, without a compliance with the conditions Congress had prescribed. *Dred Scott* v. *Sandford*, 19 How. 393, 405; *Slaughter House Cases*, 16 Wall. 36, 73; *Minor* v. *Happersett*, 21 How. 162; *Boyd* v. *Nebraska*, 143 U. S. 135, 160, 12 Sup. Ct. Rep. 375.

In like manner, the States granted to the judiciary of the nation the power to determine a controversy between a State or citizens thereof

and foreign states, citizens, or subjects (Const. U. S. art. 3, § 2), and Congress conferred that power upon the circuit courts. The extent of the jurisdiction of those courts is measured by the Constitution and the acts of Congress. A foreign-born resident, who has not been naturalized according to the acts of Congress, is not a "citizen" of the United States or of a State, within the definition given by the Fourteenth Amendment to the Constitution, but remains a foreign subject or citizen; and any controversy between him and a citizen of a State which involves a sufficient amount is thus clearly within the jurisdiction of the circuit courts, under any fair construction of the Constitution and laws of the United States. The jurisdiction thus conferred it is not in the power of any State, by its legislative or other action, to take away, restrict, or enlarge, and the action of the State of Minnesota regarding the citizenship of the plaintiff was not material in this case. *Toland* v. *Sprague*, 12 Pet. 300, 328; *Cowless* v. *Mercer Co.*, 7 Wall. 118; *Railway Co.* v. *Whitton*, 13 Wall. 270, 286; *Phelps* v. *Oaks*, 117 U. S. 236, 239, 6 Sup. Ct. Rep. 714; *O'Connell* v. *Reed*, 56 Fed. Rep. 531.

The result is that the power granted to Congress by article 1, § 8, of the Constitution of the United States, to establish a uniform rule of naturalization, is exclusive; and the naturalization laws enacted by Congress in the exercise of this power constitute the only rule by which a foreign subject may become a citizen of the United States or of a State, within the meaning of the Federal Constitution and laws. It is not in the power of a State to denationalize a foreign subject who has not complied with the Federal naturalization laws, and constitute him a citizen of the United States or of a State, so as to deprive the Federal courts of jurisdiction over a controversy between him and a citizen of a State, conferred upon them by article 3, § 2, of the Constitution of the United States, and the acts of Congress.

A foreign subject who is qualified to become a citizen of the United States, under section 2167 of the Revised Statutes, does not become such by filing his declaration of intention so to do. That section requires that he shall renounce allegiance to the sovereignty of which he he is a subject, take the oath of allegiance to the United States, and comply with the other conditions prescribed in the second and third paragraphs of section 2165 of the Revised Statutes, in order to become naturalized; and until he does so he remains a foreign subject.

The court below was right in denying the motion to dismiss this action for want of jurisdiction, and the judgment below is affirmed, with costs.[1]

[1] According to *Boyd* v. *Thayer*, 1891, 143 U. S. 135, p. 162, "Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen.

In Re MOSES.

United States Circuit Court, S. D. New York, 1897.

(83 *Federal*, 995.)

Petition of Marcus Moses for writ of *habeas corpus*.

Lacombe, Circuit Judge. The act of Aug. 18, 1894, c. 301 (28 Stat. 390), provides that:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or custom officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

If, therefore, the petitioner's wife and children are "aliens," this court cannot inquire into the correctness of the decision of the immigration officers. *Lem Moon Sing* v. *U. S.*, 158 U. S. 540, 15 Sup. Ct. 967. In other words, the only jurisdictional facts which it is necessary

* * *. Congress, in the exercise of the power to establish a uniform rule of naturalization, has enacted general laws under which individuals may be naturalized, but the instances of collective naturalization by treaty or by statute are numerous. * * * Manifestly the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided." The learned Chief Justice proceeds to an enumeration of the many instances of collective naturalization in our history. A much shorter and more recent discussion of the subject (collective naturalization on annexation of Texas) is found in *Contzen* v. *U. S.*, 1900, 179 U. S. 191–196. See, also, *Behrensmeyer* v. *Kreitz*, 1891, 135 Ill. 591.

Chancellor Kent said, in considering the subject of naturalization: "Perhaps there might be difficulties also as to the copper-colored natives of America, or the yellow or tawney races of Asiatics, and it may well be doubted whether any of them are white persons, within the purview of the law." (2 Com. 73.) The act of Congress of May 6, 1882, removed the doubt as to "the yellow or tawny races of Asiatics" by providing "that hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed." (22 Stat. 61; *In re Saito*, 1894, 62 Fed. 126.) The African is covered by section 2169 of the Revised Statutes: "The provisions of this title shall apply to aliens (being free white persons, [*In re Camille*, 1880, 6 Fed. 256] and to aliens) of African nativity, and to persons of African descent." The "copper-colored natives of America" are statuteless; but *In re Rodriguez*, 1897, 81 Fed. 337 it was decided that a Mexican was eligible to citizenship, even although he could neither read nor write. "Congress has not seen fit," said the learned judge, "to require of applicants for naturalization an educational qualification, and courts should be careful to avoid judicial legislation."

On the naturalization of women by marriage, see *Pequignot* v. *City of Detroit*, 1883, 16 Fed. 211. — Ed.

for the respondent to establish in a proceeding of this character are — First, that the person seeking admission is an alien; and, second, that the immigration officers made their decision in the way in which the statute requires. It is no longer necessary for the respondent to offer proof in this court that such person is an immigrant, as was the case before the passage of the act of 1894, *supra*, and while the earlier acts only were in force. The decisions of this court cited on the brief (*In re Martorelli*, 63 Fed. 437; *In re Maiola*, 67 Fed. 114) were rendered under the earlier acts, and are no longer applicable.

The petitioner relies upon an exception contained in the statute which excludes persons suffering from a loathsome or contagious disease, or persons likely to become a public charge, in these words:

"But this section shall not be held to exclude persons living in the United States from sending for a relative or friend, who is not of the excluded classes," &c.

But under the act of 1894 the decision of the immigration officers that a person seeking admission is of the excluded class is not reviewable in the courts.

It is further contended that petitioner is not an alien, and that, therefore, his wife and children are not aliens. Undoubtedly the citizenship of his wife and children is the same as his own; but upon the record it does not appear that the petitioner is, as he contends, a citizen of the United States. He began as an alien, — a subject of the King of Roumania. He did not change his condition nor his allegiance by merely coming to this country nor by residing here. Nor has his declaration of intention altered the situation. He does not by that document renounce his allegiance, but merely declares that it is his intention so to do at some later day; and so long as his foreign allegiance continues he remains an alien. *Lanz* v. *Randall*, 4 Dill. 425, Fed. Cas. No. 8080; *Maloy* v. *Duden*, 25 Fed. 673; *City of Minneapolis* v. *Reum*, 6 C. C. A. 31, 56 Fed. 576.

The writ is dismissed.[1]

[1] *Carlisle* v. *United States*, 1872, 16 Wall. 147, 154–156, Mr. Justice Field said: — "The claimants were residents in the United States prior to the commencement of the rebellion. They so allege in their petition; they were, therefore, bound to obey all the laws of the country, not immediately relating to citizenship, during their sojourn in it; and they were equally amenable with citizens for any infraction of those laws. 'The rights of sovereignty (Wildman, Institutes on International Law, p. 40) extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are naturalized and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection.'

"By allegiance is meant the obligation of fidelity and obedience which the individual

Section 22. — Status of American Indians.

ELK v. WILKINS.

Supreme Court of the United States, 1884.

(112 *United States Reports*, 94.)

This was an action brought by an Indian in the Circuit Court of the United States for the District of Nebraska, against the registrar of one of the wards of the city of Omaha, for refusing to register him as a qualified voter therein.

owes to the government under which he lives, or to his sovereign, in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.

"This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen. In the case of Thrasher, a citizen of the United States resident in Cuba, who complained of injuries suffered from the government of that island, Mr. Webster, then Secretary of State, made, in 1851, a report to the President in answer to a resolution of the House of Representatives, in which he said: 'Every foreigner-born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country.' And again: 'Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger-born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation' (Webster's Works, Vol. VI. p. 526). This same doctrine is stated in Hale's Pleas of the Crown (Vol. I. ch. 10), East's Crown Law (Vol. I. ch. 2, sec. 4), and Foster's Discourse upon High Treason (sec. 2, p. 185), all of which are treatises of approved merit.

"Such being the established doctrine, the claimants here were amenable to the laws of the United States prescribing punishment for treason and for giving aid and comfort to the rebellion. They were, as domiciled aliens in the country prior to the rebellion, under the obligation of fidelity and obedience to the government of the United States. They subsequently took their lot with the insurgents, and would be subject like them to punishment under the laws they violated but for the proclamation of

Mr. Justice GRAY delivered the opinion of the court, extracts from which are as follows: —

the President of Dec. 25, 1868. That proclamation, in its comprehensive terms, includes them and all others in like situation. It grants 'unconditionally, and without reservation, to all and to every person who, directly or indirectly, participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof.'"

In *Lem Moon Sing* v. *United States*, 1894, 158 U. S. 538, 547, it is said: "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications. Is a statute passed in execution of that power any less applicable to an alien, who has acquired a commercial domicile within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to reënter it? We think not. The words of the statute are broad and include "every case" of an alien, at least every Chinese alien, who, at the time of its passage, is out of this country, no matter for what reason, and seeks to come back. He is none the less an alien because of his having a commercial domicile in this country. While he lawfully remains here he is entitled to the benefit of the guarantees of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot reënter the United States in violation of the will of the Government as expressed in enactments of the law-making power. He cannot, by reason merely of his domicile in the United States for purposes of business, demand that his claim to reënter this country by virtue of some statute or treaty, shall be determined ultimately, if not in the first instance, by the courts of the United States, rather than exclusively and finally, in every instance, by executive officers charged by an act of Congress with the duty of executing the will of the political department of the government in respect of a matter wholly political in its character. He left the country subject to the exercise by Congress of every power it possessed under the Constitution.

The question of citizenship has frequently arisen in cases of foreign residents who claim immunity attached to American citizenship. The following are a few selected examples:

Hausding's Case (1885), in which it was held that children born in the United States of alien parents, and never dwelling in the United States, are not citizens thereof (2 Wharton's Digest, 399); *Embden's Case* (1885) held that children born abroad of citizens of the United States, and continuing to reside abroad, are not citizens thereof unless they elect to become such on coming of age (2 Wharton's Digest, 410); and in *A Prussian Subject's Case* (1875), it was held by the Attorney-General that under the treaty of 1868 between the United States and the North German Confederation, a Prussian by birth, naturalized in the United States, is presumed to have renounced his American citizenship if he returns to Prussia, and resides there two years (2 Wharton's Digest, 412).

In the United States there are two classes, native and naturalized citizens. These possess equal rights under the law, *Osborn* v. *U. S. Bank*, 1824, 9 Wheat. 738, 827, but

"* * * The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason

by the Constitution only the native-born are eligible to the presidency and vice-presidency. "It seems to have grown into a rule," says Atty.-Gen. Bradford, in 1794, "that a nation ought not to interfere in the causes of its citizens brought before foreign tribunals, excepting in the case of a refusal of justice — palpable and evident injustice — or a violation of rules and forms," and in *Murray* v. *Charming Betsy*, 1804, 2 Cr. 64, 120, Chief Justice Marshall says: "The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American Government in his favor would be considered as a justifiable interposition. But his situation is completely changed where, by his own act, he has made himself the subject of a foreign power."

After speaking of the protection the citizen enjoys in United States, Mr. Justice Miller says: "Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States (*Slaughter House Cases*, 1872, 16 Wall. 36, 79–80). See, also, the case of *The Leghorn Seizures*, 1892, 27 Ct. of Cl. 224, 235–236, 241. And in *DeBode* v. *Reg.*, 1851, 3 H. L. C. 449, 465, Lord Chancellor Truro held: "It is admitted law that if the subject of a country is spoliated by a foreign government he is entitled to obtain redress from the foreign government through the means of his own government. But if, from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country."

The alien, as well as his property, enjoys an equal protection before the law; for the temporary allegiance which he owes demands in return protection from the government. To what extent this protection is enjoyed the above cases show. If the alien temporarily or permanently residing in foreign parts is not reciprocally well treated, the government whose citizens are injured may expel or place under corresponding disability citizens of the offending nation within its limits, or it may demand through diplomatic channels their protection. In case of the native-born, this is a perfect right; in case of naturalized citizens the right is perfect as against third parties, but imperfect as against the mother country, while in cases of mere "declaration of intention" and incomplete naturalization the claim is of the slightest. The following cases will perhaps serve to make this clear:

Wagner's Case, 1882 (2 Wharton's Digest, 392), to the effect that a foreign minor who emigrates to and becomes naturalized in the United States, may on returning to his original state be forced to perform military service due at time of his original departure, but that it would be highly unreasonable to exact the performance of a service or duty non-existent or inchoate at the time of his emigration.

Koszta's Case, 1853 (Cockburn's Nationality, 118), was one of imperfect naturalization, in that the claimant had merely declared his intention to become a citizen, but had not as yet fully complied with final requirements of the law. It appears that he was a Hungarian refugee of 1848–9; that he was *domiciled* in the United States; that he had previously declared his intention to become an American citizen; that he was temporarily absent from the United States; that he was furnished with a consular travelling pass, stating that he was entitled to American protection.

The subsequent proceedings are thus described by Mr. Justice Miller, in *Re Neagle*,

of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the Fourteenth Amendment to the Constitution.

"Under the Constitution of the United States, as originally established, 'Indians not taxed,' were excluded from the persons according to whose numbers representatives and direct taxes were apportioned

1889, 135 U. S. 1, 64: "One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul-general at that place and carried on board the *Hussar*, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war *St. Louis*, arriving in port at this critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demand, were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul, subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hülsemann, the Austrian minister [chargé d'affaires] at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair." See, further, Magoon's Military Occupation, 118–120, and for the diplomatic correspondence between the two governments, 2 Wharton's Digest, §§ 175, 198.

Koszta's Case excited at the time and since much unfavorable and some favorable criticism and comment, for which see Hall's Int. Law, 251–254 and Calvo, Vol. II. pp 45–47, 66, 142–145. Professor Pomeroy's position is as follows: "The discussion between the two cabinets was long and somewhat acrimonious. But I believe that Mr. Marcy conducted the correspondence with so much ability that he convinced his opponents . . . Now, although Koszta's crime was a political one, . . . I see no reason why the same doctrine would not apply to the case of any other offender. Doubtless, indeed, our government would not have exhibited as much alacrity, in case the man had been a common murderer or thief, but they certainly might have done so with the same result. International Law, 253–258.

Tousig's Case, 1854 (Lawrence's Wheaton, 1863, 929), was simple: he was an Austrian by birth who had acquired a domicile in the United States, and although unnaturalized, had been improperly furnished with an American passport. On his return to Austria he was arrested and charged with offences committed before emigrating from Austria. The difference between the two cases is sufficiently plain. Tousig voluntarily subjected himself to Austrian jurisdiction; Koszta wisely kept away from the fatherland, and was apprehended by Austrian authorities in neutral territory. In Tousig's case the American Government neither should nor did offer protection; in Koszta's case it protected Koszta's "inchoate rights" — a phrase much employed by Fuller, C. J., in *Boyd* v. *Thayer*, 1891, 143 U. S. 135 — against violation in a neutral port. If Koszta had returned to Austria, the cases would have been on all fours. — Ed.

among the several states; and Congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the States of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through acts of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage resembling that of a ward to his guardian. Indians and their property exempt from taxation by treaty or statute of the United States, could not be taxed by any State. General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. Constitution, art. 1, secs. 2, 8; art. 2, sec. 2; *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Worcester* v. *Georgia*, 6 Pet., 515; . . . *Crow Dog's Case*, 109 U. S. 556. * * *

"The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life. * * *

"Chief Justice Taney, in the passage cited for the plaintiff from his opinion in *Scott* v. *Sandford*, 19 How., 393, 404, did not affirm or imply that either the Indian tribes, or individual members of those tribes, had the right, beyond other foreigners, to become citizens of their own will, without being naturalized by the United States. His words were: 'They' (the Indian tribes) 'may without doubt, like the subjects of any foreign government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.' But an emigrant from any foreign state cannot become a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required by law.

"The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitution, by which 'no person, except a natural born citizen or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President;' and 'the Congress shall have power to establish an uniform rule of naturalization.' Constitution, art. 2, sec. 1; art. 1, sec. 8.

"By the Thirteenth Amendment of the Constitution slavery was prohibited. The main object of the opening sentence of the Fourteenth Amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes, *Scott* v. *Sandford*, 19 How., 393; and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside. *Slaughter House Cases*, 16 Wall., 36, 73; *Strauder* v. *West Virginia*, 600 U. S., 303, 306.

"This section contemplates two sources of citizenship, and two sources only; birth and naturalization. The persons declared to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof,' the evident meaning of these last words is not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by force of a treaty by which foreign territory is acquired.

"Indians born within the territorial limits of the United States, members of, and owing allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. * * *

"Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being 'naturalized in the United States,' by or under some treaty or statute. * * *

"The act of July 27, 1868, ch. 249, declaring the right of expatriation to be a natural and inherent right of all people, and reciting that 'in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship,' while it affirms the right of every man to expatriate himself from one country, contains nothing to enable him to become a citizen of another, without being naturalized under its authority. 15 Stat., 223; Rev. Stat., § 1999.

"The provision of the act of Congress of March 3, 1871, ch. 120, that 'hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty,' is coupled with a provision that the obligation of any treaty already lawfully made is not to be thereby invalidated or impaired, and its utmost possible effect is to require the Indian tribes to be dealt with for the future through the legislative and not through the treaty-making power. 16 Stat., 566; Rev. Stat., § 2079. * * *

"The plaintiff, not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no right secured by the Fifteenth Amendment, and cannot maintain this action.

"Judgment affirmed."

UNITED STATES v. KAGAMA.

SUPREME COURT OF THE UNITED STATES, 1886.

(118 *United States Reports*, 375.)

Mr. Justice MILLER delivered the opinion of the court.

"The case is brought here by certificate of division of opinion between the Circuit Judge and the District Judge holding the Circuit Court of the United States for District of California.

"The questions certified arise on a demurrer to an indictment against two Indians for murder committed on the Indian reservation of Hoopa Valley, in the State of California, the person murdered being also an Indian of said reservation. Though there are six questions certified as the subject of difference, the point of them all is well set out in the third and sixth, which are as follows:

"Whether the provisions of said section 9 (of the act of Congress of March 3, 1885), making it a crime for one Indian to commit murder upon another Indian, upon an Indian reservation situated wholly

within the limits of a State of the Union, and making such Indian so committing the crime of murder within and upon such Indian reservation 'subject to the same laws' and subject to be 'tried in the same courts, and in the same manner, and subject to the same penalties as are all other persons' committing the crime of murder 'within the exclusive jurisdiction of the United States,' is a constitutional and valid law of the United States?'

"'6. Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the use of the Indian tribe to which said Indians both belong?'

"The indictment sets out in two counts that Kagama, alias Pactah Billy, an Indian, murdered Iyouse, alias Ike, another Indian, at Humboldt county, in the State of California, within the limits of the Hoopa Valley Reservation, and it charges Mahawaha, alias Ben, also an Indian, with aiding and abetting in the murder.

"The law referred to in the certificate is the last section of the Indian appropriation act of that year, and is as follows:

"'9. That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any territory of the United States, and either within or without the Indian reservation, shall be subject therefor to the laws of said Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States., 23 Stat. Ch., 341, 362, § 9, 385.

"The above enactment is clearly separable into two distinct definitions of the conditions under which Indians may be punished for the same crimes as defined by the common law. The first of these is

where the offence is committed within the limits of a territorial government, whether on or off an Indian reservation. In this class of cases the Indian charged with the crime shall be judged by the laws of the Territory on that subject, and tried by its courts. This proposition itself is new in legislation of Congress, which has heretofore only undertaken to punish an Indian who sustains the usual relation to his tribe, and who commits the offence in the Indian country, or on an Indian reservation, in exceptional cases; as where the offence was against the person or property of a white man, or was some violation of the trade and intercourse regulations imposed by Congress on the Indian tribes. It is new, because it now proposes to punish these offences when they are committed by one Indian on the person or property of another.

"The second is where the offence is committed by one Indian against the person or property of another, within the limits of a State of the Union, but on an Indian reservation. In this case, of which the State and its tribunals would have jurisdiction if the offence was committed by a white man outside an Indian reservation, the courts of the United States are to exercise jurisdiction as if the offence had been committed at some place within the exclusive jurisdiction of the United States. The first clause subjects all Indians guilty of these crimes, committed within the limits of a Territory, to the laws of that Territory, and to its courts for trial. The second, which applies solely to offences by Indians which are committed within the limits of a State and the limits of a reservation, subjects the offenders to the laws of the United States passed for the government of places under the exclusive jurisdiction of those laws, and to trial by the courts of the United States. This is a still further advance, as asserting this jurisdiction over the Indians within the limits of the States of the Union.

"Although the offence charged in this indictment was committed within a State and not within a Territory, the considerations which are necessary to a solution of the problem in regard to the one must in a large degree affect the other.

"The Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders.

"In declaring the basis on which representation in the lower branch of the Congress and direct taxation should be apportioned, it was fixed that it should be according to numbers, *excluding Indians not taxed*, which, of course, excluded nearly all of that race, but which meant that if there were such within a State as were taxed to support the government, they should be counted for representation, and in the

computation for direct taxes levied by the United States. This expression, excluding Indians not taxed, is found in the XIVth amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. Neither of these shed much light on the power of Congress over the Indians in their existence as tribes, distinct from the ordinary citizens of a State or Territory.

"The mention of Indians in the constitution which has received most attention is that found in the clause which gives Congress 'power to regulate commerce with foreign nations and among the several States, and with the Indian tribes.'

"This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes. While we are not able to see, in either of these clauses of the Constitution and its amendments, any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians, there is a suggestion in the manner in which the Indian tribes are introduced into that clause, which may have a bearing on the subject before us. The commerce with foreign nations is distinctly stated as submitted to the control of Congress. Were the Indian tribes foreign nations? If so, they came within the first of the three classes of commerce mentioned, and did not need to be repeated as Indian tribes. Were they nations, in the minds of the framers of the Constitution? If so, the natural phrase would have been 'foreign nations and Indian nations,' or, in the terseness of language uniformly used by the framers of the instrument, it would naturally have been 'foreign and Indian nations.' And so in the case of *The Cherokee Nation* v. *The State of Georgia*, 5 Pet., 1, 20, brought in the Supreme Court of the United States, under the declaration that the judicial power extends to suits between a State and foreign states, and giving to the Supreme Court original jurisdiction where a State is a party, it was conceded that Georgia as a State came within the clause, but held that the Cherokees were not a State or nation within the meaning of the Constitution, so as to be able to maintain the suit.

"But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else. *Murphy* v. *Ramsey*, 114 U. S., 15, 44.

"In the case of *American Ins. Co.* v. *Canter*, 1 Pet., 511, 542, in which the condition of the people of Florida, then under a territorial government, was under consideration, MARSHALL, Chief Justice, said: 'Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire Territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned.'

"In the case of the *United States* v. *Rogers*, 4 How., 567, 572, where a white man pleaded in abatement to an indictment for murder committed in the country of the Cherokee Indians, that he had been adopted by and become a member of the Cherokee tribe, Chief Justice TANEY said: 'The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular State. It is true it is occupied by the Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe and they hold with the assent of the United States, and under their authority.' After referring to the policy of the European nations and the United States in asserting dominion over all the country discovered by them, and

the justice of this course, he adds: 'But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet it is a question for the law-making and political departments of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority, and when the country occupied by one of them is not within the limits of one of the States, Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian.'

"The Indian reservation in the case before us is land bought by the United States from Mexico by the treaty of Guadaloupe Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that treaty to the United States.

"The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.

"Following the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or people without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

"Perhaps the best statement of their position is found in the two opinions of this court by Chief Justice Marshall in the case of the *Cherokee Nation* v. *Georgia*, 5 Pet., 1, and in the case of *Worcester* v.

State of Georgia, 6 Pet., 515, 536. These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin, in the former, is a very valuable resumé of the treaties and statutes concerning the Indian tribes previous to and during the confederation.

"In the first of the above cases it was held that these tribes were neither States nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them.

"In the opinions in these cases they are spoken of as 'wards of the nation,' 'pupils,' as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in § 2079 of the Revised Statutes:

"'No Indian nation or tribe, within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.'

"The case of *Crow Dog*, 109 U. S., 556, in which an agreement with the Sioux Indians, ratified by an act of Congress, was supposed to extend over them the laws of the United States and the jurisdiction of its courts, covering murder and other grave crimes, shows the purpose of Congress in this new departure. The decision in that case admits that if the intention of Congress had been to punish, by the United States courts, the murder of one Indian by another, the law would have been valid. But the court could not see, in the agreement with the Indians sanctioned by Congress, a purpose to repeal § 2146 of the Revised Statutes, which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country. The passage of the act now under consideration was designed to remove that objection, and to go further by including such crimes on reservations lying within a State.

"Is this latter fact a fatal objection to the law? The statute itself

contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. But Congress *has* done this, and *can* do it, with regard to all offences relating to matters to which the Federal authority extends. Does that authority extend to this case?

"It will be seen at once that the nature of the offence (murder) is one which in almost all cases of its commission is punishable by the laws of the States, and within the jurisdiction of their courts. The distinction is claimed to be that the offence under the statute is committed by an Indian, that it is committed on a reservation set apart within the State for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the State Courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

"It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this Court whenever the question has arisen.

"In the case of *Worcester* v. *The State of Georgia*, above cited, it was held that, though the Indians had by treaty sold their land within that State, and agreed to remove away, which they had failed to do, the State could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the State and the process of its courts.

"The same thing was decided in the case of *Fellows* v. *Blacksmith and Others*, 19 How., 366. In this case, also, the Indians had sold their lands under supervision of the States of Massachusetts and

of New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the State could not enforce this removal, but the duty and the power to do so was in the United States. See also the case of the *Kansas Indians*, 5 Wall., 737; *New York Indians*, 5 Wall., 761.

"The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

"We answer the questions propounded to us, that the 9th section of the act of March, 1885, is a valid law in both its branches, and that the Circuit Court of the United States for the District of California has jurisdiction of the offence charged in the indictment in this case.[1]

Section 23. — Treaties the Law of the Land.

FOSTER & ELAM v. NEILSON, 1829.

(2 *Peters*, 253 *at* 314.)

Extract from judgment of Marshall, C. J. —

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of

[1] For the treaty relations of the United States with the various Indian nations and tribes, see 2 Butler's Treaty-Making Power, 1902, §§ 401, 423; for the legal and political conditions of the tribal Indians, see the late Professor Thayer's two articles: "A People without Law," 68 Atlantic Monthly (1891), 540, 676; 2 Harvard Law Review (1888), 167; "The Legal Status of the Indian," 15 Am. Law Review (1881), 21. — Ed.

any legislative provision. But when the terms of the stipulation import a contract when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.[1]

Mr. Justice FIELD, in *Geofroy* v. *Riggs*, 1889, 133 U. S. 258, 266: —

That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co.* v.

[1] See the elaboration of this definition by Mr. Justice Miller, in the *Head Money Cases*, 1884, 112 U. S. 580, 597–599.

The Kestor, 1901, 110 Fed. 432, 448, Bradford, District Judge, says: "Treaty stipulations between the United States and foreign nations are not restrictive of the constitutional power of Congress. They have the force of law, but, like statutes, are superseded in American courts by subsequent acts of Congress conflicting with them. *Head Money Cases*, 112 U. S. 580; *Whitney* v. *Robertson*, 124 U. S. 190; *The Chinese Exclusion Case*, 130 U. S. 581; *Horner* v. *U. S.*, 143 U. S. 570; *Fong Yue Ting* v. *U. S.*, 149 U. S. 698. It goes without saying that mere international comity not incorporated in any convention between the United States and a foreign power must yield to a statute with which it is in conflict. There is, as before stated, no treaty between the United States and Great Britain inconsistent with the application of the section to British vessels. The proviso has reference to treaties, and not to international comity not embodied in a treaty. Full effect must therefore be given to the proviso that 'this section shall apply as well to foreign vessels as to vessels of the United States,' as a constitutional enactment applying to the prepayment on our soil or in our waters of the wages of seamen who are British subjects shipping in American ports on British vessels." — ED.

Lowe, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat. 259; *Hauenstein* v. *Lynham*, 100 U. S. 483; 8 Opinions Attys. Gen. 417; *The People* v. *Gerke*, 5 California, 381.[1]

CHARLES WUNDERLE *et al.* v. CATHARINE WUNDERLE.

SUPREME COURT OF ILLINOIS, 1893.

(144 *Illinois*, 40.)

Mr. Justice MAGRUDER delivered the opinion of the court.[2]

Alexander Wunderle, the owner of the land in controversy, died intestate and without issue, and left him surviving a widow, who is the appellee herein, and one brother and one sister, who are the appellants herein. His death took place in January, 1891, while the act of 1887 hereinafter mentioned was in force. Have appellants become the owners of one undivided half of the land, subject to the widow's dower and homestead rights therein, under the laws of this State in regard to the descent of property? The decision of this question depends upon the decision of the further question, whether the fact, that the appellants were non-resident aliens at the time of the intestate's decease, rendered them incapable of taking real estate in Illinois by inheritance.

By chapter 4 of the Revised Statutes of 1845, it was provided, that "all aliens, *residing in this State*, may take by deed, will or otherwise, lands and tenements, and any interest therein, and alienate, sell, assign, and transmit the same to their heirs, or any other persons, whether such heirs or other persons be citizens of the United States or not, in the same manner as natural-born citizens of the United States or of this State might do; and, upon the decease of any alien having title, or interest in, any lands or tenements, such lands and tenements shall pass and descend in the same manner as if such alien were a citizen of the United States, and it shall be no

[1] For the view that the Federal Government is not limited by the Constitution of the United States in its exercise of the treaty-making power, see Butler's Treaty-Making Power. — ED.

[2] Statement of case omitted and only so much of the opinion is given as relates to the operation of the treaty. — ED.

objection to any persons having an interest in such estate that they are not citizens of the United States; but all such persons shall have the same rights and remedies, and in all things be placed on the same footing, as natural-born citizens and actual residents of the United States." It will be noticed that the act of 1845 conferred the right to take lands by deed, will, or otherwise, and to alienate, sell, assign and transmit the same, upon "*all aliens residing in this State.*"

By an act, approved Feb. 17, 1851, the foregoing provision of said chapter 4 of the Revised Laws was amended by leaving out the words, "residing in this State," after the words, "all aliens," so as to confer the right to take lands by deed, will or otherwise, and to alienate, sell, assign and transmit the same, upon all aliens whether residing in Illinois or not. 1 Starr & Cur. Ann. Stat. chap. 6, p. 264. The act of 1851 remained in force until 1887. On June 16, 1887, the Legislature passed an act, which went into force on July 1, 1887, entitled "An Act in regard to aliens, and to restrict their right to acquire and hold real and personal estate, and to provide for the disposition of the lands now owned by non-resident aliens." Laws of Ill. of 1887, p. 5; 3 Starr & Cur. Ann. Stat. chap. 6, p. 60.

By the tenth section of the act of 1887, the act of 1851, "and all other acts and parts of acts in conflict with" the act of 1887, are repealed. The first section of the act of 1887, with the exception of the proviso at the end thereof in reference to "minor aliens actually residing in the United States," is as follows: "Be it enacted, * * * that a non-resident alien, firm of aliens, or corporation incorporated under the laws of any foreign country, shall not be capable of acquiring title to or taking or holding any lands or real estate in this State by descent, devise, purchase or otherwise, except that the heirs of aliens who have heretofore acquired lands in this State under the laws thereof, and the heirs of aliens who may acquire lands under the provisions of this act, may take such lands by devise or descent and hold the same for the space of three years and no longer, if such alien at the time of so acquiring such lands is of the age of twenty-one years, and if not twenty-one years of age, then for the term of five years from the time of so acquiring such lands, and if, at the end of the time herein limited, such lands so acquired by such alien heirs have not been sold to *bonâ fide* purchasers for value, or such alien heirs have not become actual residents of this State, the same shall revert and escheat to the State of Illinois the same as the lands of other aliens under the provisions of this act." By the use of the words, "heirs of aliens who *may acquire* lands under the provisions of this act," reference is evidently made to the case specified in section 8 of the act, where a non-resident alien, owning lands in this

State at the time the act took effect, disposes of the same during his lifetime, and takes security for the purchase money, and afterwards he, "or his non-resident heirs," again obtain the title on sale made under a judgment or decree, rendered in order to enforce the payment of any part of such purchase money.

The appellants do not come within the terms of the exception mentioned in section 1, because they are not the heirs of an alien, but, on the contrary, the deceased intestate, whose heirs they claim to be, was a citizen and resident of the United States at the time of his death. They do, however, come directly within the terms of the principal or enacting clause of section 1. As it is conceded that they are and always have been residents of the Grand Duchy of Baden and subjects of the German Empire, each of them is a non-resident alien; and the enacting clause of section 1 expressly and explicitly declares, that "a non-resident alien * * * shall not be capable of acquiring title to or taking or holding any lands or real estate in this State by descent." Manifestly, therefore, the appellants are not entitled to take any portion of the lands in controversy by inheritance from their deceased brother, if the act of 1887, as applied to the facts of this case, is a valid law. The subject presented by the record is the validity of the act of 1887.

First, it is said, that the act conflicts with various treaties made by the government of the United States, and particularly with a treaty made in 1871 with the German empire.

It is a general rule of the common law, that the title to real property must be acquired and passed according to the *lex rei sitæ*. This rule not only applies to alienations and acquisitions made by the acts of the parties, but also to estates and rights acquired by operation of law. The descent and heirship of real estate are governed by the law of the country where it is located. (Story on Confl. of Laws, secs. 424, 448, 483, 509; *Stoltz* v. *Doering*, 112 Ill. 234.) This principle, originally applicable as between countries entirely foreign to each other, also prevails as among the States of the American Union. From it results the doctrine, that the title of aliens to land within the limits of the several States is matter of State regulation. Williams on Real Property, 4th ed., p. 64, note 1; Lawrence's Wheaton on International Law, p. 168 n.; Story on Confl. of Laws, sec. 430; Wheaton's Int. Law (Boyd), 3d ed., p. 132; 2 Wharton's Inter. Law Dig., bottom pages 490 and 497; Field's Inter. Code, 2d ed., p. 176. But while it is true that "the right of foreigners to hold title to real estate is entirely dependent on the laws of the State in which the land is situate," 2 Wharton's Int. Law Dig., sec. 201, p. 490, it is also true that the State law must give way if it conflicts with any existing treaty

between the government of the United States and the government of the country of which such foreigner is a subject or citizen.

Article 6 of the Federal Constitution provides, that "all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." In construing this article it has been held, that provisions in regard to the transfer, devise or inheritance of property are fitting subjects of negotiation and regulation by the treaty-making power of the United States, and that a treaty will control or suspend the statutes of the individual States whenever it differs from them. Hence, if the citizen or subject of a foreign government is disqualified under the laws of a State from taking, holding or transferring real property, such disqualification will be removed, if a treaty between the United States and such foreign government confers the right to take, hold or transfer real property. *Hauenstein* v. *Lynham*, 100 U. S. 483; *Geofroy* v. *Riggs*, 133 U. S. 258; *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat. 259; *Orr* v. *Hodgson*, 4 Wheat. 453; *Fairfax* v. *Hunter*, 7 Cranch, 603; *The People* v. *Gerke*, 5 Cal. 381. But the treaty which will suspend or override the statute of a State must be a treaty between the United States and the government of the particular country of which the alien, claiming to be relieved of the disability imposed by the State law, is a citizen or subject. A treaty with some other country, of which such alien is not a citizen or subject, cannot have the effect of removing the disability complained of.

The objection made to the act of 1887 is, that it does not allow non-resident aliens, who would be the heirs of citizens under the Illinois statute of descents but for their alienage, to hold real estate, which they might otherwise inherit as heirs, for such a reasonable length of time as would enable them to sell the same, and remove the proceeds of sale. In support of this objection counsel refer us to several treaties containing such provisions as the following: "Where on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of *detraction* on the part of the governments of the respective States." Lawrence's Wheaton on Int. Law, p. 167; Wheaton's Int. Law, 3d Eng. ed. by Boyd, pp. 131, 132. But the appellants are subjects of the Grand Duchy of Baden; and counsel have referred us to no treaty with Baden, nor have we

been able to find any, which contains such a provision as that last above quoted. The treaties between the United States and Baden, made in 1857 and in 1868, had reference to the extradition of criminals and to naturalization, but they contained no stipulations as to the acquisition, or transfer, or transmission of property. Treaties and Conventions, U. S., 1776–1887, pp. 41–46. On the contrary, we find it stated in one of the works on international law, that, at a time when certain treaties were made with some of the German states by a representative of the United States, "Baden declined making any." Lawrence's Wheat. on Int. Law, p. 168, note.

It is claimed, however, that the treaty concluded on Dec. 11, 1871, between the German Empire, of which Baden now forms a part, and the United States, contains a stipulation which should be so construed as to remove the disability imposed upon the appellants by the act of 1887. That stipulation is embodied in Article 10 of the treaty and is as follows: "In all successions to inheritances, citizens of each of the contracting parties shall pay in the country of the other such duties only as they would be liable to pay, if they were citizens of the country in which the property is situated, or the judicial administration of the same may be exercised. Treaties and Conventions, U. S., 1776–1887, p. 366. This article in a treaty, made by the German empire soon after its formation, conferred no new rights so far as the power to take, hold, or dispose of land was concerned. It merely recognized existing treaties theretofore made between the United States and certain of the German states, which became parts of the empire when it was formed. It did nothing more than stipulate in regard to the payment of duties in cases where treaties already in existence contained provisions upon the subject of successions to inheritances. Article 10 permitted such stipulations as had been made in the treaties of the separate states to continue in force under the treaty of the empire, but neither that article, nor any other article of the treaty of 1871, provided that the subjects of the empire should be permitted to take or hold real estate in the United States, except so far as the right to do so was guaranteed by existing treaties.

In *Re Thomas*, 12 Blatchf. 370, in an opinion delivered by Mr. Justice Blatchford, it was held that the convention, concluded between Bavaria and the United States on Sept. 12, 1853, for the extradition of criminals, was not abrogated by the absorption of Bavaria into the German Empire; and the learned Justice there says: "An examination of the provisions of the constitution of the German Empire does not disclose anything which indicates that then existing treaties between the several states composing the confederation called

the German Empire and foreign countries were annulled, or to be considered as abrogated."

Our conclusion upon this branch of the case is that the disability imposed upon non-resident aliens by the first section of the act of 1887 is not removed, so far as the appellants are concerned, by any existing treaty between the United States and the Grand Duchy of Baden, or between the United States and the German Empire; nor is the disqualification of the appellants, as declared by said act, affected in any way by provisions in treaties between the United States and other governments than those of Baden and the German Empire.[1]

[1] Note the language of Mr. Justice Swayne in *Hauenstein* v. *Lynham*, 1879, 100 U. S. 483, 488–490: "The efficacy of the treaty is declared and guaranteed by the Constitution of the United States. That instrument took effect on the fourth day of March, 1789. In 1796, but a few years later, this court said: 'If doubts could exist before the adoption of the present national government, they must be entirely removed by the sixth article of the Constitution, which provides that "all treaties made or which shall be made under the authority of the United States shall be *the supreme law of the land*, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." There can be no limitation on the power of the people of the United States. By their authority the State constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State constitutions or to make them yield to the general government and to treaties made by their authority. A treaty cannot be *the supreme law of the land*, that is, of all the United States, if any act of a State Legislature can stand in its way. If the constitution of a State (which is the fundamental law of the State and paramount to its Legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the State Legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual State, and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only, by a repeal or nullification by a State Legislature, this certain consequence follows, — that the will of a small part of the United States may control or defeat the will of the whole.' *Ware* v. *Hylton*, 3 Dall. 199.

"It will be observed that the treaty-making clause is retroactive as well as prospective. The treaty in question, in *Ware* v. *Hylton*, was the British treaty of 1783, which terminated the war of the American Revolution. It was made while the Articles of Confederation subsisted. The Constitution, when adopted, applied alike to treaties 'made and to be made.'

"We have quoted from the opinion of Mr. Justice Chase in that case, not because we concur in everything said in the extract, but because it shows the views of a powerful legal mind at that early period, when the debates in the convention which framed the Constitution must have been fresh in the memory of the leading jurists of the country.

"In *Chirac* v. *Chirac*, 2 Wheat. 259, it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The State law was hardly adverted to, and

HAVER v. YAKER.

SUPREME COURT OF THE UNITED STATES, 1869.

(9 *Wallace*, 32.)

Mr. Justice DAVIS delivered the opinion of the court.

It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date (Wheaton's International Law, by Dana, 336, bottom paging). But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as

seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal* v. *Banks*, 10 id. 181, and with respect to the British treaty of 1794, in *Hughes* v. *Edwards*, 9 id. 489. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. *Orr* v. *Hodgeson*, 4 id. 453. By the British treaty of 1794, 'all impediment of alienage was absolutely levelled with the ground despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. *Fairfax's Devisees* v. *Hunter's Lessee*, 7 Cranch, 627; see *Ware* v. *Hylton*, 3 Dall. 242.' 8 Op. Att'ys-Gen. 417. Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: 'Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it.' Treaties on the Const. and Gov. of the U. S. 204.

"If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.' Const., art. 1, § 10.

"It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. See, also, *Shanks* v. *Dupont*, 3 Pet. 242; *Foster & Elam* v. *Neilson*, 2 id. 253; *The Cherokee Tobacco*, 11 Wall. 616; Mr. Pinkney's Speech, 3 Elliot's Constitutional Debates, 231; *The People*, &c., v. *Gerke & Clark*, 5 Cal. 381.

"We have no doubt that this treaty is within the treaty-making power conferred by the Constitution. And it is our duty to give it full effect."

The power of the Federal Government to conclude a treaty, which either expressly or impliedly repeals or modifies a State statute, is considered on principle and affirmatively established in the light of legal theory in *People* v. *Gerke*, 1858, 5 Cal. 381. — ED.

concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in *Arredondo's Case*, reported in 6th Peters, Vol. VI. p. 749. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

These views dispose of this case, and we are not required to determine whether this treaty, if it had become a law at an earlier date, would have secured the plaintiffs in error the interest which they claim in the real estate left by Yaker at his death.

Judgment affirmed.[1]

[1] Mr. Justice Wayne, in *Davis* v. *The Police Jury*, 1850, 9 How. 280, 289, says: "All treaties, as well those for cessions of territory as for other purposes, are binding upon the contracting parties, unless when otherwise provided in them, from the day they are signed, the ratification of them relates back to the time of signing. Vattel, B. 4, c. 2, § 22; Mart. Summary, B. 8, c. 7, § 5.

"It is true that, in a treaty for the cession of territory, its national character continues, for all commercial purposes; but full sovereignty, for the exercise of it, does not pass to the nation to which it is transferred until actual delivery. But it is also true, that the exercise of sovereignty by the ceding country ceases except for strictly municipal purposes, especially for granting lands. And for the same reason in both cases; — because, after the treaty is made, there is not in either the union of possession and the right to the territory which must concur to give *plenum dominium et utile*. To give that, there must be the *jus in rem* and the *jus in re*, or what is called in the common law of England the *juris et seisinal conjunctio*. 'This general law of property applies to the right of territory no less than to other rights, and all writers upon the law of nations concur, that the practice and conventional law of nations has been conformable to this principle.' Puffendorf, par Barbeyrac, lib. 4, c. 9, § 8, note 2.

"In this case, after the treaty was made, and until Louisiana was delivered to France, its possession continued in Spain. The right to the territory, though in France, was imperfect until ratified, but absolute by ratification from the date of the treaty." The learned justice cited with approval, indeed he based his argument and opinion upon the judgment of Sir William Scott in the *Fama*, 1804, 5 C. Rob. 106. — Ed.

WHITNEY v. ROBERTSON.

SUPREME COURT OF THE UNITED STATES, 1887.

(124 *United States*, 190.)

Mr. Justice FIELD delivered the opinion of the court.

The plaintiffs are merchants, doing business in the city of New York, and in August, 1882, they imported a large quantity of "centrifugal and molasses sugars," the produce and manufacture of the island of San Domingo. These goods were similar in kind to sugars produced in the Hawaiian Islands, which are admitted free of duty under the treaty with the king of those islands, and the act of Congress, passed to carry the treaty into effect. They were duly entered at the custom house at the port of New York, the plaintiffs claiming that by the treaty with the Republic of San Domingo the goods should be admitted on the same terms, that is, free of duty, as similar articles, the produce and manufacture of the Hawaiian Islands. The defendant, who was at the time collector of the port, refused to allow this claim, treated the goods as dutiable articles under the acts of Congress, and exacted duties on them to the amount of $21,936. The plaintiffs appealed from the collector's decision to the Secretary of the Treasury, by whom the appeal was denied. They then paid under protest the duties exacted, and brought the present action to recover the amount.

The complaint set forth the facts as to the importation of the goods, the claim of the plaintiffs that they should be admitted free of duty because like articles from the Hawaiian Islands were thus admitted, the refusal of the collector to allow the claim, the appeal from his decision to the Secretary of the Treasury and its denial by him, and the payment under protest of the duties exacted, and concluded with a prayer for judgment for the amount. The defendant demurred to the complaint, the demurrer was sustained, and final judgment was entered in his favor, to review which the case is brought here.

The treaty with the king of the Hawaiian Islands provides for the importation into the United States, free of duty, of various articles, the produce and manufacture of those islands, in consideration, among other things, of like exemption from duty, on the importation into that country, of sundry specified articles which are the produce and manufacture of the United States. 19 Stat. 625. The language of the first two articles of the treaty, which recite the reciprocal engage-

ments of the two countries, declares that they are made in consideration "of the rights and privileges" and "as an equivalent therefor," which one concedes to the other.

The plaintiffs rely for a like exemption of the sugars imported by them from San Domingo upon the 9th article of the treaty with the Dominican Republic, which is as follows: "No higher or other duty shall be imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic, or of her fisheries; and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article the growth, produce, or manufacture of the United States, or their fisheries, than are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country, or its fisheries." 15 Stat. 473, 478.

In *Bartram* v. *Robertson*, decided at the last term (122 U. S. 116), we held that brown and unrefined sugars, the produce and manufacture of the island of St. Croix, which is part of the dominions of the King of Denmark, were not exempt from duty by force of the treaty with that country, because similar goods from the Hawaiian Islands were thus exempt. The first article of the treaty with Denmark provided that the contracting parties should not grant "any particular favor" to other nations in respect to commerce and navigation, which should not immediately become common to the other party, who should "enjoy the same freely if the concession were freely made, and upon allowing the same compensation if the concession were conditional." 11 Stat. 719. The fourth article provided that no "higher or other duties" should be imposed by either party on the importation of any article which is its produce or manufacture, into the country of the other party, than is payable on like articles, being the produce or manufacture of any other foreign country. And we held in the case mentioned that "those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the King of Denmark, to each other, that in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges."

The counsel for the plaintiffs meet this position by pointing to the omission in the treaty with the Republic of San Domingo of the provision as to free concessions, and concessions upon compensation, contending that the omission precludes any concession in respect of commerce and navigation by our government to another country, without that concession being at once extended to San Domingo. We do not think that the absence of this provision changes the obligations of the United States. The 9th article of the treaty with that republic, in the clause quoted, is substantially like the 4th article in the treaty with the King of Denmark. And as we said of the latter, we may say of the former, that it is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce, or manufacture of their respective countries, in favor of articles of like character, imported from any other country. It has no greater extent. It was never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our government intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests.

But, independently of considerations of this nature, there is another and complete answer to the pretensions of the plaintiffs. The act of Congress under which the duties were collected authorized their exaction. It is of general application, making no exception in favor of goods of any country. It was passed after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy

is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance. In *Taylor* v. *Morton*, 2 Curtis, 454, 459, this subject was very elaborately considered at the circuit by Mr. Justice Curtis, of this court, and he held that whether a treaty with a foreign sovereign had been violated by him; whether the consideration of a particular stipulation of the treaty had been voluntarily withdrawn by one party so that it was no longer obligatory on the other; whether the views and acts of a foreign sovereign had given just occasion to the legislative department of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, were not judicial questions; that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws. And he justly observed, as a necessary consequence of these views, that if the power to determine these matters is vested in Congress, it is wholly immaterial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad.

In these views we fully concur. It follows, therefore, that when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the Government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. In *Head Money Cases*, 112 U. S. 580, it was objected to an act of Congress that it violated provisions contained in treaties with foreign nations, but the court replied that so far as the provisions of the act were in conflict with any treaty, they must prevail in all the courts of the country; and, after a full and elaborate consideration

of the subject, it held that "so far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."

Judgment affirmed.[1]

[1] In *Botiller* v. *Dominguez*, 1889, 130 U. S. 238, 247, it is said: "With regard to the first of these propositions it may be said, that so far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute, enacted for the purpose of ascertaining the validity of claims derived from the Mexican Government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon another the obligations of a treaty. This court in a class of cases like the present has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. The *Cherokee Tobacco*, 11 Wall. 616; *Taylor* v. *Morton*, 2 Custis, 454; *Head Money Cases*, 112 U. S. 580, 598; *Whitney* v. *Robertson*, 124 U. S. 190, 195."

In *Adams* v. *Akerlund*, 1897, 168 Ill. 632, 638, Mr. Justice Magruder said: "Where treaties concern the rights of individuals, it is frequently necessary for the courts to ascertain by construction the meaning intended to be conveyed by the terms used. *United States* v. *Rauscher*, 119 U. S. 407; *Wilson* v. *Wall*, 6 Wall. 83; *Head Money Cases*, 112 U. S. 580. In thus giving a construction to the language of treaties, the courts will adopt the same general rules which are applicable in the construction of statutes, contracts and written instruments generally, in order to effectuate the purpose and intention of the makers. 26 Am. & Eng. Ency. of Law, p. 555. Moreover, it is another well-settled rule, laid down by the Supreme Court of the United States, that, 'where a treaty admits of two constructions, one restricted as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred.' *Hauenstein* v. *Lynham*, 100 U. S. 483; *Schultze* v. *Schultze*, 144 Ill. 290."

In *Tucker* v. *Alexandroff*, 1901, 183 U. S. 424, 437, Mr. Justice Brown uses the following language: "We think, then, that the rights of the parties are to be determined by the treaty, but that this particular convention, being operative upon both powers and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. Taylor on International Law, § 383. As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence. It is said by Chancellor Kent in his Commentaries, Vol. I., p. 174: 'Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.'"

If treaties between nations standing upon the same social and intellectual plain are to be liberally construed, it stands to reason that when one contracting party is a powerful and enlightened, the other a backward, weak and therefore dependent nation,

SUTTON v. SUTTON.

COURT OF CHANCERY, 1830.

(1 *Russell & Mylne*, 663.)

The Master of the Rolls [Sir John LEACH].[1]

The relations, which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

The act of 37 George III. gives full effect to this article of the treaty in the strongest and clearest terms; and if it be, as I consider

the letter must yield much to the spirit. Or as Mr. Justice Gray said, in *Jones* v. *Meehan*, 1899, 175 U. S. 1, 11: "The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Worcester* v. *Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737, 760; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 28."

But, however liberally the treaty may be interpreted, it is the agreement made by the parties, not by the court, that is to be interpreted. The spirit will, indeed, be found out, but a new clause will not be read in the treaty. For example, in *The Amiable Isabella*, 1821, 6 Wheat. 1, Mr. Justice Story refused to read into the treaty of 1795 with Spain the form of a passport which the contracting parties had, it would seem, inadvertently left out. In like manner the Supreme Court in a recent case refused to consider a "proviso" (to which ratification was made subject) as part of the treaty, because the proviso was omitted in the official publication of the treaty. *N. Y. Indians* v. *U. S.*, 1897, 170 U. S. 1. Where, however, a written declaration was annexed to the treaty at the time of its ratification, the declaration was held as obligatory as if the provision had been inserted in the body of the treaty itself, because the declaration was annexed with full knowledge and consent of both parties to the treaty. *Doe* v. *Braden*, 1853, 16 How. 635.

On the question of the interpretation of treaties in general, see a very learned and comprehensive note by J. C. Bancroft Davis, U. S. Treaties and Conventions, 1889, pp. 1227–1229 (printed with additions, 2 Butler's Treaty-Making Power, note 6, pp. 145–148). — ED.

[1] The statement of the case is omitted. The ninth article of Jay's Treaty enabled the subjects of either country to hold lands in the other, and to sell and devise them as if they were natives. — ED.

it, the true construction of this article, that it was to be permanent, and independent of a state of peace or war, then the act of Parliament must be held, in the twenty-fourth section, to declare this permanency; and when a subsequent section provides that the act is to continue in force, so long only as a state of peace shall subsist, it cannot be construed to be directly repugnant and opposed to the twenty-fourth section, but is to be understood as referring to such provisions of the act only as would in their nature depend upon a state of peace.

I am of opinion, therefore, in favor of the title, and consider that the heirs and assigns of every American who held lands in Great Britain at the time mentioned in the act of the 37 George III. are, as far as regards those lands, to be treated, not as aliens, but as native subjects.[1]

SOCIETY FOR THE PROPAGATION OF THE GOSPEL IN FOREIGN PARTS v. THE TOWN OF NEW HAVEN, AND WILLIAM WHEELER.

SUPREME COURT OF THE UNITED STATES, 1823.

(8 *Wheaton*, 464.)

This case came before the court upon a certificate of a division in opinion of the judge of the circuit court for the District for Vermont. It was an action of ejectment, brought by the plaintiffs against the defendants, in that court.

Mr. Justice WASHINGTON delivered the opinion of the court:

1st. That the capacity of the plaintiffs, as a corporation, to hold lands in Vermont, ceased by, and as a consequence of, the revolution.

2dly. That the society being, in its politic capacity, a foreign corporation, it is incapable of holding land in Vermont, on the ground of alienage; and that its rights are not protected by the treaty of peace.

[1] This same ninth article was previously considered in an American case. In *Fox* v. *Southack*, 1815, 12 Mass. 143, 148, Jackson, J., says: "It is not necessary for the determination of this cause, to decide whether the ninth article of that treaty was annulled by the late war; as, if it were so, that circumstance would not give any new rights to the plaintiff. There seems, however, to be no doubt that this article is one of those stipulations which are distinguished by some of the writers on the law of nations as *real* in their own nature; and which are accomplished by the act of ratification, so that they cannot be dissolved by any subsequent event. *Pactum liberatorium, quo pax nemisso aut transactio, facta est, qua jus extinctum reviviscere non protest.* Commentary of H. Coccius on Grotius, B. 2, c. 16, § 16." — ED.

3dly. That if they were so protected, still the effect of the last war between the United States and Great Britain was to put an end to that treaty, and, consequently, to rights derived under it, unless they had been revived by the treaty of peace, which was not done.

2. The next question is, was this property protected against forfeiture, for the cause of alienage, or otherwise, by the treaty of peace? This question, as to real estates belonging to British subjects, was finally settled in this court, in the case of *Orr* v. *Hodgson* (4 Wheat. Rep. 453), in which it was decided, that the sixth article of the treaty protected the titles of such persons, to lands in the United States, which would have been liable to forfeiture, by escheat, for the cause of alienage, or to confiscation, *jure belli*.

The counsel for the defendants did not controvert this doctrine, so far as it applies to natural persons; but he contends, that the treaty does not, in its terms, embrace corporations existing in England, and that it ought not to be so construed. The words of the sixth article are, "there shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property," etc.

The terms in which this article is expressed are general and unqualified, and we are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the court to make exceptions by construction, where the parties to the contract have not thought proper to make them. Where the language of the parties is clear of all ambiguity, there is no room for construction. Now, the parties to this treaty have agreed, that there shall be no future confiscations in any case, for the cause stated. How can this court say, that this is a case where, for the cause stated, or for some other, confiscation may lawfully be decreed? We can discover no sound reason why a corporation existing in England may not as well hold real property in the United States, as ordinary trustees for charitable, or other purposes; or as natural persons for their own use. We have seen that the exemption of either or all of those persons, from the jurisdiction of the courts of the State where the property lies, affords no such reason.

It is said that a corporation cannot hold lands, except by permission of the sovereign authority. But this corporation did hold the land in question, by permission of the sovereign authority, before, during, and subsequent to the revolution, up to the year 1794, when the Legislature of Vermont granted it to the town of New Haven; and the

only question is, whether this grant was not void by force of the sixth article of the above treaty? We think it was.

Was it meant to be contended, that the plaintiffs are not within the protection of this article, because they are not *persons* who could take part in the war, or who can be considered by the court as British subjects? If this were to be admitted, it would seem to follow, that a corporation cannot lose its title to real estate, upon the ground of alienage, since, in its civil capacity, it cannot be said to be born under the allegiance of any sovereign. But this would be to take a very incorrect view of the subject. In the case of *The Bank of the United States* v. *Deveaux*, 5 Cranch's Rep. 86, it was stated by the court, that a corporation, considered as a mere legal entity, is not a citizen, and, therefore, could not, as such, sue in the courts of the United States, unless the rights of the members of it, in this respect, could be exercised in their corporate name. It was added, that the name of the corporation could not be an alien or a citizen; but the corporation may be the one or the other, and the controversy is, in fact, between those persons and the opposing party.

But even if it were admitted that the plaintiffs are not within the protection of the treaty, it would not follow that their right to hold the land in question was devested by the act of 1794, and became vested in the town of New Haven. At the time when this law was enacted, the plaintiffs, though aliens, had a complete, though defeasible, title to the land, of which they could not be deprived for the cause of alienage, but by an inquest of office; and no grant of the State could, upon the principles of the common law, be valid, until the title of the State was so established. *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch's Rep. 503. Nor is it pretended by the counsel for the defendants, that this doctrine of the common law was changed by any statute law of the State of Vermont, at the time when this land was granted to the town of New Haven. This case is altogether unlike that of *Smith* v. *The State of Maryland*, 6 Cranch's Rep. 286, which turned upon an act of that State, passed in the year 1780, during the revolutionary war, which declared, that all property within the State, belonging to British subjects, should be seized, and was thereby confiscated to the use of the State; and that the commissioners of confiscated estates should be taken as being in the actual seisin and possession of the estates so confiscated, without any office found, entry, or other act to be done. The law in question passed long after the treaty of 1783, and without confiscating or forfeiting this land (even if that could be legally done), grants the same to the town of New Haven.

3. The last question respects the effect of the late war, between

Great Britain and the United States, upon rights existing under the treaty of peace. Under this head, it is contended by the defendants' counsel, that although the plaintiffs were protected by the treaty of peace, still, the effect of the last war was to put an end to that treaty, and, consequently, to civil rights derived under it, unless they had been revived and preserved by the treaty of Ghent.

If this argument were to be admitted in all its parts, it nevertheless would not follow, that the plaintiffs are not entitled to a judgment on this special verdict. The defendants claim title to the land in controversy solely under the act of 1794, stated in the verdict, and contend, that by force of that law, the title of the plaintiffs was devested. But if the court has been correct in its opinion upon the two first points, it will follow, that the above act was utterly void, being passed in contravention of the treaty of peace, which, in this respect, is to be considered as the supreme law. Remove that law, then, out of the case, and the title of the plaintiffs, confirmed by the treaty of 1794, remains unaffected by the last war, it not appearing from the verdict, that the land was confiscated, or the plaintiffs' title in any way devested, during the war, or since, by office found, or even by any legislative act.

But there is a still more decisive answer to this objection, which is, that the termination of a treaty cannot devest rights of property already vested under it.

If real estate be purchased or secured under a treaty, it would be most mischievous to admit, that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed, that rights of property already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests.

But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them ; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it

would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

A majority of the court is of opinion, that judgment upon this special verdict ought to be given for the plaintiffs, which opinion is to be certified to the circuit court.

Certificate for the plaintiffs.[1]

[1] "The passage cited by counsel from the language of Mr. Justice Washington in *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 493, also illustrates this doctrine. There the learned justice observes that 'if real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights than the repeal of a municipal law affects rights acquired under it.' Of this doctrine there can be no question in this court." *The Chinese Exclusion Case*, 1888, 130 U. S. 581, 610.

To the same effect *Fiott et als.* v. *Commonwealth*, 1855, 12 Gratt. 564, 577, where it is said: "But it has been determined by the Supreme Court that the termination of a treaty by war does not divest rights of property already vested under it. *Society for, &c.* v. *New Haven*, 8 Wheat. R. 464. *Fox* v. *Southack*, 12 Mass. R. 143."

The following is a well-known diplomatic exemplification of the rule of the principal case. By the treaty of 1783, between Great Britain and the United States, the latter secured certain fishery privileges upon the coast of Newfoundland, Nova Scotia, and Labrador. Great Britain claimed that the privilege was a mere commercial regulation and as such abrogated by the war of 1812. The United States maintained, on the contrary, that the privilege operated as a grant, and was at most only suspended not abrogated by the war. The correctness of the British contention is recognized in "the convention of 1818" between the two countries. See Hall, Inter. Law, 99–102, for this and other instances. Pomeroy, 368–371. — Ed.

HOOPER, ADM'R, v. UNITED STATES, AND OTHER CASES, 1887.

(22 *Court of Claims*, 408, 416.) [1]

DAVIS, J. The treaties of 1778, particularly the treaty of commerce, which is the most important one for our purposes, were in existence until the passage of the abrogating act. Whatever disputes occurred between this country and France during the disputed period following the conclusion of the Jay Treaty arose from differences of interpretation of various clauses of the Franco-American treaty, and on neither side do we find seriously advanced a contention that the treaties were not in existence and were not binding on both nations. The United States distinctly urged their enduring force, while the French departed from this position only in this (if it be a departure), that the Jay Treaty introduced a modification into their treaty with us of which they were entitled to the benefit.

As to the period after July 7, 1798:

On that date the abrogating act passed by Congress was approved by the President and became a law within the jurisdiction of the Constitution; a law replacing to that extent the treaties, and binding upon all the subordinate agents of the nation, including its courts, but not necessarily final as the annulment of an existing contract between two sovereign powers.

A treaty which on its face is of indefinite duration, and which contains no clause providing for its termination, may be annulled by one of the parties under certain circumstances. As between the nations it is in its nature a contract, and if the consideration fail, for example, or if its important provisions be broken by one party, the other may, at its option, declare it terminated. The United States have so held in regard to the Clayton-Bulwer Treaty, as to which Mr. Frelinghuysen, then Secretary of State, wrote Mr. Hall, minister in Central America (July 19, 1884): "The Clayton-Bulwer Treaty was voidable at the option of the United States. This, I think, has been demonstrated fully upon two grounds. First, that the consideration of the treaty having failed, its object never having been accomplished, the United States did not receive that for which they covenanted; and, second, that Great Britain has persistently violated her agreement not to colonize the Central American coast."

[1] Only so much of the opinion is given as relates to annulment of treaties. — ED.

Here concur two clear reasons for annulment, failure of consideration and an active breach of contract.[1]

Abrogation of a treaty may occur by change of circumstances, as: "When a state of things which was the basis of the treaty, and one of its tacit conditions, no longer exists. In most of the old treaties were inserted the *clausula rebus sic stantibus*, by which the treaty might be construed as abrogated when material circumstances on which it rested changed. To work this effect it is not necessary that the facts alleged to have changed should be material conditions. It is enough if they were strong inducements to the party asking abrogation.

"The maxim '*Conventio omnis intelligitur rebus sic stantibus*' is held to apply to all cases in which the reason for a treaty has failed, for there has been such a change of circumstances as to make its performance impracticable except at an unreasonable sacrifice." Wharton's Com. Am. Law, § 161.

"Treaties, like other contracts, are violated when one party neglects or refuses to do that which moved the other party to engage in the transaction. * * * When a treaty is violated by one party in one or more of its articles, the other can regard it as broken and demand redress, or can still require its observance." Woolsey, § 112.

The United States annulled, or at least attempted to annul, the treaties with France upon the grounds, stated in the preamble of the statute, that the treaties had been repeatedly violated by France, that the claims of the United States for reparation of the injuries committed against them had been refused; that attempts to negotiate had been repelled with indignity and that there was still being pursued against this country a system of "predatory violence infracting the said treaties and hostile to the rights of a free and independent nation." Such were the charges upon which was based the enactment that "the United States are of right freed and exonerated from the stipulations of the treaty and of the consular convention heretofore

[1] The court is obliged to follow the decision of the political department as to the existence or non-existence of a treaty. If the treaty is really binding, its violation would give rise, in terms of private law, to an action for the breach of contract which, in international law, would be prosecuted between nation and nation, that is diplomatically, and might result in war if the injury complained of be not redressed by the defendant state. Hart, 211.

As to the provisions of the Clayton-Bulwer Treaty and its somewhat checkered career, see T. J. Lawrence's Essays on International Law, 2d ed., pp. 89–162; the late Freeman Snow in 3 Harv. Law Rev. 53–73; C. H. Hyde (The Isthmian Canal Treaty), in 15 ib. 725–732. The Hay-Pauncefote Treaty of Nov. 18, 1901, put an end to this unfortunate controversy, and with its ratification on Dec. 16, 1901, Clayton, Bulwer, and their treaty were laid to rest. — Ed.

concluded between the United States and France, and that the same shall not henceforth be regarded as legally obligatory on the government or citizens of the United States."

The treaties, therefore, ceased to be a part of the supreme law of the land, and when Chief Justice Marshall stated, in July, 1799, *Chirac* v. *Chirac*, 2 Wheaton, 272, that there was no treaty in existence between the two nations, he meant only that within the jurisdiction of the Constitution the treaties had ceased to exist, and did not mean to decide, what it was exclusively within the power of the political branch of the government to decide, that, as a contract between two nations the treaties had ceased to exist by the act of one party, a result which the French ministers afterwards said could be reached only by a successful war.

The only question that we have now to consider is that of the international relation. The annulling act issued from competent authority and was the official act of the government of the United States. So far as it was in the power of one party to abrogate these treaties it was indisputably done by the act of July 7, 1798. Notwithstanding this statute, did not the treaties remain in effect to this extent, if no further, that they furnish a scale by which the acts of France, which we are charged to examine, are to be weighed; and in considering the legality of those acts are we not to follow the treaties where they vary the law of nations? The claimants in very learned and philosophical arguments contend for the affirmative.

We are of the opinion that the circumstances justified the United States in annulling the treaties of 1778; that the act was a valid one, not only as a municipal statute, but as between the nations; and that thereafter the compacts were ended. We fail to find any agreement by France as to these claims to submit to the treaty rules after July 7, 1798, the treaties not being recognized by us, and we conclude that the validity of claims not expressly mentioned in the treaty of 1800, which arose after July 7, 1798, is to be ascertained by the principles of the law of nations, recognized at that time, and not by exceptional provisions found in the treaties of 1778.[1]

[1] On the subject of treaties generally, see Butler's Treaty-Making Power, 2 vols. 1902, for an exposition of power to conclude treaties, together with an examination of the treaties themselves and the construction courts of justice have put upon them.

The appendix to Vol. II. contains an alphabetical summary of every treaty and convention (other than postal), concluded by the United States and ratified by the Senate. — Ed.

TERLINDEN v. AMES.

Supreme Court of the United States, 1901.

(184 *United States*, 270.)

One Terlinden, alias Graefe, was accused of various acts of forgery, counterfeiting, and the utterance of forged papers, committed during the year 1901, in the kingdom of Prussia. After the commission of these extradictable offences he fled from Germany and was apprehended in Illinois in 1901, as a fugitive from justice upon a warrant properly issued by Mark A. Foote, United States Commissioner for the Northern District of Illinois, upon the duly verified complaint of Dr. Walther Wever, Imperial German Consul at Chicago. On *habeas corpus* proceedings, the District Court found that the accused was lawfully restrained of his liberty, and the prisoner was remanded to the custody of John C. Ames, Marshal for the Northern District of Illinois.

From this order an appeal was taken to the Supreme Court of the United States. Among the errors assigned, were the following two: that the District Court erred in declining to hold that no treaty exists between the United States and the kingdom of Prussia or the German Empire, and in assuming the existence of such treaty.[1]

Mr. Chief Justice Fuller delivered the opinion of the court.[2]

This brings us to the real question, namely, the denial of the existence of a treaty of extradition between the United States and the Kingdom of Prussia, or the German Empire. In these proceedings the application was made by the official representative of both the Empire and the Kingdom of Prussia, but was based on the ex-

[1] This statement is substituted for that of the report. — Ed.

[2] In the omitted portion of the opinion, the learned chief justice held that extradition proceedings before a committing magistrate, thereto duly authorized, where jurisdiction exists, and there is competent legal evidence tending to establish the criminality alleged, cannot be interfered with by *habeas corpus*; that in this case the writ of *habeas corpus* was issued before the examination by the commissioner was entered upon, and the inquiry was confined to the question of jurisdiction; that in this case he had jurisdiction if there was a treaty between this and the demanding country provided the commission of an extraditable offence was charged (from the headnote). In reaching this conclusion the learned chief justice cited, examined, and approved the following authorities: *In re Stupp*, 1875, 12 Blatch. 501; *Ornelas* v. *Ruiz*, 1895, 161 U. S. 502; *Bryant* v. *U. S.*, 1896, 167 U. S. 104; *Craemer* v. *Washington*, 1897, 168 U. S. 124. — Ed.

tradition treaty of 1852. The contention is that, as the result of the formation of the German Empire, this treaty had been terminated by operation of law.

Treaties are of different kinds and terminable in different ways. The fifth article of this treaty provided, in substance, that it should continue in force until 1858, and thereafter until the end of a twelve months' notice by one of the parties of the intention to terminate it. No such notice has ever been given, and extradition has been frequently awarded under it during the entire intervening time.

Undoubtedly treaties may be terminated by the absorption of powers into other nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance.

This treaty was entered into by his Majesty the King of Prussia in his own name and in the names of eighteen other States of the Germanic Confederation, including the Kingdom of Saxony and the free city of Frankfort, and was acceded to by six other States, including the Kingdom of Würtemburg, and the free Hanseatic city of Bremen, but not including the Hanseatic free cities of Hamburg and Lubeck. The war between Prussia and Austria in 1866 resulted in the extinction of the Germanic Confederation and the absorption of Hanover, Hesse, Cassel, Nassau and the free city of Frankfort, by Prussia.

The North German Union was then created under the praesidium of the Crown of Prussia, and our minister to Berlin, George Bancroft, thereupon recognized officially not only the Prussian Parliament, but also the Parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount constitution of the North German United States, the King of Prussia, to whom he was accredited, was at the head of those several organizations or institutions; and his action was entirely approved by this Government. Messages and Documents, Dep. of State, 1867–8, Part I, p. 601; Dip. Correspondence, Secretary Seward to Mr. Bancroft, Dec. 9, 1867.

February 22, 1868, a treaty relative to naturalization was concluded between the United States and his Majesty, the King of Prussia, on behalf of the North German Confederation, the third article of which read as follows: "The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part and Prussia and other States of Germany on

the other part, the sixteenth day of June, one thousand eight hundred and fifty-two, is hereby extended to all the States of the North German Confederation." 15 Stat. 615. This recognized the treaty as still in force, and brought the Republics of Lubeck and Hamburg within its scope. Treaties were also made in that year between the United States and the Kingdoms of Bavaria and Würtemburg, concerning naturalization, which contained the provision that the previous conventions between them and the United States in respect of fugitives from justice should remain in force without change.

Then came the adoption of the Constitution of the German Empire. It found the King of Prussia, the chief executive of the North German Union, endowed with power to carry into effect its international obligations, and those of his kingdom, and it perpetuated and confirmed that situation. The official promulgation of that Constitution recited that it was adopted instead of the Constitution of the North German Union, and its preamble declared that "his Majesty the King of Prussia, in the name of the North German Union, his Majesty the King of Bavaria, his Majesty the King of Würtemburg, his Highness the Grand Duke of Baden, and his Royal Highness the Grand Duke of Hesse and by Rhine for those parts of the Grand Duchy of Hesse which are situated south of the Main, conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same, as well as for the promotion of the welfare of the German people." As we have heretofore seen, the laws of the Empire were to take precedence of those of the individual States, and it was vested with the power of general legislation in respect of crimes.

Article 11 read, "The King of Prussia shall be the president of the Confederation, and shall have the title of German Emperor. The Emperor shall represent the Empire among nations, declare war, and conclude peace in the name of the same; enter into alliances and other conventions with foreign countries, accredit ambassadors, and receive them. . . . So far as treaties with foreign countries refer to matters which, according to Article IV. are to be regulated by the legislature of the Empire, the consent of the Federal Council shall be required for their ratification, and the approval of the Diet shall be necessary to render them valid."

It is contended that the words in the preamble translated "an eternal alliance" should read "an eternal union," but this is not material, for admitting that the Constitution created a composite State instead of a system of confederated States, and even that it was called a confederated Empire rather to save the *amour propre* of some of its component parts than otherwise, it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties

theretofore entered into by it could not be performed either in the name of its King or that of the Emperor. We do not find in this constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed.

And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance. During the period from 1871 to the present day, extradition from this country to Germany, and from Germany to this country, has been frequently granted under the treaty, which has thus been repeatedly recognized by both governments as in force. Moore's Report on Extradition with Returns of all Cases, 1890.

In 1889, in response to a request for information on international extradition as practised by the German Government, the Imperial Foreign Office transmitted to our chargé at Berlin a memorial on the subject, in the note accompanying which it was said: "The questions referred to, in so far as they could not be uniformly answered for all the confederated German States, have been answered in that document as relating to the case of applications for extradition addressed to the Empire or Prussia." It was stated in the memorial, among other things:

"In so far as by laws and treaties of the Empire relating to the extradition of criminals, provisions which bind all the States of the union have not been made, those States are not hindered from independently regulating extradition by agreements with foreign States, or by laws enacted for their own territory.

"Of conventions, some of an earlier, some of a later period, for the extradition of criminals, entered into by individual States of the union with various foreign States, there exist a number, and in particular such with France, the Netherlands, Austria-Hungary, and Russia. With the United States of America, also, extradition is regulated by various treaties, as, besides the treaty of June 16, 1852, which applies to all of the States of the former North German Union, and also to Hesse, south of the Main, and to Würtemburg, there exist separate treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively." Moore's Report, 93, 94.

Thus it appears that the German Government has officially recognized, and continues to recognize, the treaty of June 16, 1852, as still

in force, as well as similar treaties with other members of the Empire, so far as the latter has not taken specific action to the contrary or in lieu thereof. And see Laband, Das Staatsrecht des Deutschen Reiches (1894), 122, 123, 124, 142.

It is out of the question that a citizen of one of the German States, charged with being a fugitive from its justice, should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the Empire as to its powers and the powers of its members, and especially as the executive department of our government has accepted these conclusions and proceeded accordingly.

The same is true as respects many other treaties of serious moment, with Prussia, and with particular States of the Empire, and it would be singular, indeed, if after the lapse of years of performance of their stipulations, these treaties must be held to have terminated because of the inability to perform during all that time of one of the parties.

In the notes accompanying the State Department's compilation of Treaties and Conventions between the United States and other powers, published in 1889, Mr. J. C. Bancroft Davis treats of the subject thus:

"The establishment of the German Empire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the States composing the Empire. It cannot be said that any fixed rules have been established.

"Where a State has lost its separate existence, as in the case of Hanover and Nassau, no questions can arise.

"Where no new treaty has been negotiated with the Empire, the treaties with the various States which have preserved a separate existence have been resorted to.

"The question of the existence of the extradition treaty with Bavaria was presented to the United States District Court, on the application of a person accused of forgery committed in Bavaria, to be discharged on *habeas corpus*, who was in custody after the issue of a mandate, at the request of the minister of Germany. The court held that the treaty was admitted by both governments to be in existence.

"Such a question is, after all, purely a political one."

The case there referred to is that of *In re Thomas*, 12 Blatch. 370, in which the continuance of the extradition treaty with Bavaria was called in question, and Mr. Justice Blatchford, then district judge, said:

"It is further contended, on the part of Thomas, that the convention with Bavaria was abrogated by the absorption of Bavaria into the German Empire. An examination of the provisions of the Constitution of the German Empire does not disclose anything which indicates that then existing treaties between the several States composing the confederation called the German Empire, and foreign countries, were annulled, or to be considered as abrogated.

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent's Com. 174. In the present case the mandate issued by the government of the United States shows that the convention in question is regarded as in force both by the United States and by the German Empire, represented by its envoys, and by Bavaria, represented by the same envoy. The application of the foreign government was made through the proper diplomatic representative of the German Empire and of Bavaria, and the complaint before the commissioner was made by the proper consular authority representing the German Empire and also representing Bavaria."

We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard.

Treaties of extradition are executory in their character, and fall within the rule laid down by Chief Justice Marshall in *Foster* v. *Neilson*, 2 Pet. 253, 314, thus: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department."

In *Doe* v. *Braden*, 16 How. 635, 656, where it was contended that so much of the treaty of February 22, 1819, ceding Florida to the United States, as annulled a certain land grant, was void for want of power in the King of Spain to ratify such a provision, it was held that whether or not the King of Spain had power, according to the

Constitution of Spain, to annul the grant, was a political and not a judicial question, and was decided when the treaty was made and ratified.

Mr. Chief Justice Taney said: "The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered."

Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender.

In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision. 1 Moore on Extradition, 21; *United States* v. *Rauscher*, 119 U. S. 407.

The power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. *Holmes* v. *Jennison*, 14 Pet. 540, 569. Its exercise pertains to public policy and governmental administration, is devolved on the executive authority, and the warrant of surrender is issued by the Secretary of State as the representative of the President in foreign affairs.

If it be assumed in the case before us, and the papers presented on the motion for a stay advise us that such is the fact, that the commissioner, on hearing, deemed the evidence sufficient to sustain the charges, and certified his findings and the testimony to the Secretary of State, and a warrant for the surrender of Terlinden on the proper requisition was duly issued, it cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both governments had proceeded, had terminated by reason of the adoption of the constitution of the German Empire, notwithstanding the judgment of both governments to the contrary.

The decisions of the executive department in matters of extradition, within its own sphere, and in accordance with the Constitution,

are not open to judicial revision, and it results that where proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of *habeas corpus*.

The District Court was right, and its final order is

Affirmed.

Mr. Justice HARLAN did not hear the argument and took no part in the decision of the case.[1]

"LA NINFA."

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, 1896.

(75 *Federal*, 513.)

HAWLEY, District Judge.[2]

From these facts the question arises whether Behring Sea, at a distance of more than one league from the American shore, is Alaskan territory, or in the waters thereof, or within the dominion of the United States in the waters of Behring Sea. Section 1956 of Revised Statutes reads as follows:

"Sec. 1956. No person shall kill any otter, mink, marten or fur-seal, or other fur-bearing animal, within the limits of Alaska Territory, or in the waters thereof; * * * and all vessels, their tackle, apparel, furniture and cargo, found engaged in violation of this section shall be forfeited," &c.

Section 3 of the act to provide for the protection of the salmon fisheries of Alaska, approved March 2, 1889, provides that section 1956 "is hereby declared to include and apply to all the dominion of the United States in the waters of Behring Sea; and it shall be the duty of the President, at a timely season in each year, to issue his proclamation and cause the same to be published * * * warning all persons against entering said waters for the purpose of violating the provisions of said section," &c. By these provisions, the question as to what the boundaries were over which the United States

[1] See also *Schultze* v. *Schultze*, 1893, 144 Ill. 290, 295, and 15 Harv. Law Rev. 847–848, for a valuable note to principal case. As to the effect of absorption of a State or province upon a treaty concluded by the State thus absorbed and a third power, and of obligations generally, see the recent instances in Magoon's Military Occupation, 177–190; 302–305; 305–313; 316–338; 529–534; 630–646; Hall's Int. Law, 96–105. — ED.

[2] Statement of case in the first part of the opinion omitted. — ED.

had dominion was not intended to be, and was not, determined by the amendatory act. The question was left open for future consideration. By reference to the proceedings in Congress, it appears that the amendment of section 1956 was brought about in the following manner: A bill was introduced in the Senate, and passed, amending section 1963 of the Revised Statutes, and to provide for better protection of the fur-seal and salmon fisheries in Alaska, and had reference to fishing and fisheries only. When this bill came to the House of Representatives, an amendment was proposed and adopted, "that section 1956 of the Revised Statutes was intended to include and apply, and is hereby decreed to include and apply, to all the waters of Behring Sea in Alaska embraced within the boundary lines mentioned and described in the treaty with Russia, dated March 30, 1867, by which the territory of Alaska was ceded to the United States," &c. The bill as thus amended was returned to the Senate. The committee on foreign relations reported the house amendment with a recommendation that it be disagreed to. Senator Morgan, of the committee, said:

"That in the report made by the committee the rights of the Government of the United States were not considered, and not intended to be considered. We only arrive at the conclusion that the question presented in the amendment of the house is of such a serious and important character that the committee on foreign relations would not undertake, at this time, to pronounce that kind of judgment upon it which is due to the magnitude of such a question. * * * The bill, as it passed the Senate originally, should pass, because it protects the salmon and other fisheries in Alaska, about which there is no dispute. But this particular question is one of very great gravity and seriousness, and the committee on foreign relations, or at least a majority of the entire committee, did not feel warranted in undertaking to consider it at this time."

Senator Sherman, of the same committee, said:

"The question proposed by the House to the form of an amendment was a grave one, and had no relation to the subject-matter of the bill, and ought not to be connected with it, — had no connection really with it, — and involved serious matters of international law, perhaps, and of public policy, and therefore it ought to be considered by itself."

The amendment made by the House was disagreed to. A committee of conference was appointed. The result was that the description as to the boundaries in the House amendment was stricken out, and the words "hereby declared to include and apply to all the dominions of the United States in the waters of Behring Sea" inserted in lieu

thereof. It thus appears, as is manifest by the act itself, that the question as to the boundaries over which the United States had dominion was not intended to be, and was not, determined when the act was passed.

The government relies solely upon the provisions of the statute to sustain the decree of the district court, and contends that the decision of the Supreme Court in *Re Cooper*, 143 U. S. 474, 12 Sup. Ct. 453, justifies the affirmance of the decree. That decision does not reach the direct point here in controversy. The court there held that the question was a political one, in which the United States had asserted a doctrine in opposition to the views contended for by the petitioner; that the negotiations were then pending in relation to the particular subject; but the court declined to decide whether the government was right or wrong in its contention, or to review the action of the political departments upon the question under review. The opinion shows that the court considered it a grave question. It recites much of the important history relative to the disputed question, but the question itself was not decided. The case was disposed of upon other grounds. What was said concerning the disputed questions had reference to the conditions then existing. The conditions now existing are entirely different. The negotiations then pending were brought about by the asserted claim of the United States to proprietary rights in the waters of Behring Sea, and in the fur-bearing animals which frequent it and its islands, which was disputed by other nations, particularly by England, the property of whose subjects had been from time to time seized by the United States for alleged violations of the statutes in question; and these controversies resulted in submitting the disputed question to an arbitration. 27 Stat. 948. Article 1 provides that:

"The questions which have arisen between the government of the United States and the government of her Britannic majesty, concerning the jurisdictional rights of the United States in the waters of Behring Sea, and concerning also the preservation of the fur-seal in, or habitually resorting to the said sea, and the rights of the citizens and subjects of either country, as regards the taking of fur-seal in, or habitually resorting to the said waters, shall be submitted to a tribunal of arbitration."

The five points submitted to the arbitrators are set forth in article 6, and, omitting the second, are as follows:

"(1) What exclusive jurisdiction in the sea, now known as the Behring Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

"(3) Was the body of water now known as the Behring Sea included in the phrase 'Pacific Ocean,' as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after said treaty?

"(4) Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring Sea east of the water boundary in the treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that treaty?

"(5) Has the United States any right, and, if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit?"

The decision of the arbitrators upon these points was as follows:

"(1) * * * By the ukase of 1821, Russia claimed jurisdiction in the sea now known as the 'Behring Sea' to the extent of one hundred Italian miles from the coasts and islands belonging to her; but in the course of the negotiations which led to the conclusion of the treaties of 1824 with the United States, and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon-shot from the shore; and it appears that from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Behring Sea, or any exclusive rights in the seal fisheries therein, beyond the ordinary limit of territorial waters. * * *

"(2). * * *

"(3) As to the third of the said five points, as to so much thereof as requires us to decide whether the body of water now known as 'Behring Sea' was included in the phrase 'Pacific Ocean,' as used in the treaty of 1825 between Great Britain and Russia, we, the said arbitrators, do unanimously decide and determine that the body of water now known as the 'Behring Sea' was included in the phrase 'Pacific Ocean,' as used in the said treaty. And as to so much of said third point as requires us to decide what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after the said treaty of 1825, we, * * * a majority of said arbitrators, do decide and determine that no exclusive rights of jurisdiction in Behring Sea, and no exclusive rights as to the seal fisheries therein, were held or exercised by Russia outside of the ordinary territorial waters after the treaty of 1825. As to the fourth of said five points, we, the said arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in the Behring

Sea east of the water boundary, in the treaty between the United States and Russia of 30th March, 1867, did pass unimpaired to the United States under the said treaty. As to the fifth of said points * * * a majority of the said arbitrators do decide and determine that the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit." 27 Am. Law Rev. 703.

By the fourteenth article of the treaty or convention submitting the questions to arbitration it was provided that:

"The high contracting parties engage to consider the result of the proceedings of the tribunal of arbitration as a full, perfect and final settlement of all the questions referred to by the arbitrators."

In submitting the questions to the high court of arbitration, the government agreed to be bound by the decision of the arbitrators, and has since passed an act to give effect to the award rendered by the tribunal of arbitration. 28 Stat. 52. The award should, therefore, be considered as having finally settled the rights of the United States in the waters of Alaska and of Behring Sea, and all questions concerning the rights of its own citizens and subjects therein, as well as of the citizens and subjects of other countries.

The true interpretation of section 1956, and of the amendment thereto, depends upon the dominion of the United States in the waters of Behring Sea, — such dominion therein as was "ceded by Russia to the United States by treaty of 1867." This question has been settled by the award of the arbitrators, and this settlement must be accepted "as final." It follows therefrom that the words "in the waters thereof," as used in section 1956, and the words "dominion of the United States in the waters of Behring Sea," in the amendment thereto, must be construed to mean the waters within three miles from the shores of Alaska. On coming to this conclusion, this court does not decide the question adversely to the political department of the government. It is undoubtedly true, as has been decided by the Supreme Court, that in pending controversies doubtful questions, which are undecided, must be met by the political department of the government. "They are beyond the sphere of judicial cognizance," and, "if a wrong has been done, the power of redress is with Congress, not with the judiciary." *The Cherokee Tobacco*, 11 Wall. 616–621. But in the present case there is no pending question left undetermined for the political department to decide. It has been settled. The award is to be construed as a treaty which has become final. A treaty, when accepted and agreed to, becomes the supreme law of the land. It binds courts as much as an act of Congress.

In *Head Money Cases,* 112 U. S. 580–598, 5 Sup. Ct. 254, the court said:

"A treaty is primarily a contract between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. * * * A treaty, then, is the law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute." *Chew Heong* v. *U. S.,* 112 U. S. 536, 540, 565, 5 Sup. Ct. 255; *U. S.* v. *Rauscher,* 119 U. S. 407–419, 7 Sup. Ct. 234.

The duty of courts is to construe and give effect to the latest expression of the sovereign will; hence it follows that, whatever may have been the contention of the government at the time *In re Cooper* was decided, it has receded therefrom since the award was rendered by an agreement to accept the same "as a full, complete, and final settlement of all questions referred to by the arbitrators," and from the further fact that the government since the rendition of the award has passed "an act to give effect to the award rendered by the tribunal of arbitration."

It is suggested in the brief of the learned counsel for the United States that:

"It may be the present policy of the government to make record evidence as to the consistency of its contentions from the beginning upon the important question of its rights to protect its property and seal fisheries. * * * It may be that it is the policy of this government to punish its own citizens and vessels, and not the citizens and vessels of England. All these and other considerations make the question one essentially political, so that courts would at least hesitate to enter any field beyond that of construing the statutes under which this case is presented."

There is nothing in the award which denies jurisdiction of the United States over her own merchant vessels on the high seas at any place not within the jurisdiction of any other sovereignty. These questions have no bearing as to the interpretation to be given to the statutes under review. These statutes, whatever their interpretation may be, must be applied to citizens and subjects of all nations, and were not intended to apply only to citizens, subjects, and vessels of America. By the terms of the arbitration, "the rights of the citizens and subjects of either country" were involved in the decision of the arbitrators, and it necessarily follows that the citizens and subjects of the United States have the same right to rely upon the

award as to their rights, under the statute, as the citizens and subjects of England. There are no provisions in the act of April 6, 1894, "to give effect to the award rendered by the tribunal of arbitration," which indicate any policy upon the part of this government to enforce any rights against its own citizens, under the statute, consistent with the contentions made, "from the beginning upon the important questions of its right to protect its property and seal fisheries." On the other hand, the entire act clearly shows that it is the policy of the government not to make any such distinction. The act was passed enacting certain rules relative to the control of its own subjects in the exercise of the right which, under the award of the arbitrators, the two countries had in common to kill seal outside of the three-mile limit.

The decree of the District Court is reversed, and the cause remanded, with instructions to the District Court to dismiss the libel.

McKenna, Circuit Judge, dissents.[1]

[1] As to the power or rather the duty of the United States Government to set aside an arbitration award between it and a foreign power, on the ground that the award was obtained fraudulently, see *Frelinghuysen* v. *Key*, 1883, 110 U. S. 63, 70–76; *La Abra Silver Mining Co.* v. *U. S.*, 1899, 175 U. S. 423, 450 *et seq.*

On this subject generally, see the masterly and monumental work of John B. Moore on International Arbitrations, 6 vols., 1898, in which are set forth the specific instances of arbitration between the United States and foreign powers, the treaties relating to such arbitrations, and a detailed history of international arbitration.

See, also, the careful theoretical presentation of the subject by M. Revon, L'Arbitrage International, 1892, and for the documents and history of the establishment of the Permanent Court of Arbitration at The Hague, see F. W. Holls, Peace Conference at The Hague, 1900.

The Permanent Court considered, as its first case, "The Pious Fund" dispute between Mexico and the United States. According to the New York *Nation* (Sept. 18, 1902), the facts of this case are as follows: "Originally, a private benefaction, it was administered by the Jesuit Missionaries of California from 1697 to 1767. After the expulsion of the Jesuits, it was transferred to the Franciscans, from whom the new-born Mexican Republic took it, guaranteeing, however, by way of indemnity, the payment in perpetuity of six per cent on the capital to the church authorities. 'Perpetuity' and the payments stopped abruptly with the cession of California to the United States, and now the church in California sues the Mexican Government for arrears of interest amounting to about $1,000,000."

On Oct. 14, 1902, the tribunal (according to the New York *Tribune*, Oct. 15, 1902), unanimously held: "First — That the claim of the United States in behalf of the Archbishop of San Francisco is governed by the principle of *res adjudicata* in virtue of the arbitration decision pronounced by Sir Edward Thornton, on Nov. 11, 1875, and amended by Sir Edward Thornton, on Oct. 24, 1876. Second — That in conformity with this decision the government of the United States of Mexico should pay the government of the United States $1,420,682.67. * * * This sum will cover the total payment of annuities due from and unpaid by the government of the Mexican Republic. * * * Third — The government of the United States of Mexico will pay to the government of the United States * * * an annual payment of $43,050.99."

For the facts of the case in detail, and the award of Sir Edward Thornton, see 2 Moore, Int. Arb. 1349–1354. — Ed.

PART II.

INTERNATIONAL RELATIONS AS MODIFIED BY WAR.

CHAPTER I.

MEASURES SHORT OF ACTUAL WAR.

Section 24. — Reprisals.

Marshall, C. J., in *The Nereide*, 1815, 9 Cranch, 388, 422: The court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them its unjust proceedings towards our citizens, is a political, not a legal measure. It is for the consideration of the government, not of its courts. The degree and the kind of the retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics. * * * If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the court is bound by the law of nations, which is a part of the law of the land.[1]

[1] "So far as the claim is made that the relators should be held in a spirit of comity and reciprocity, we can only say that the comity and reciprocity to be extended to representatives of foreign governments depends upon Congress, and is not lodged within the judiciary. See 2 Op. Atty.-Gen. 378, citing *The Nereide*, 9 Cranch, 389." Pardee, J., in *Re Aubrey*, 1885, 26 Fed. 848, 851. — Ed.

WILLIAM GRAY, ADMINISTRATOR, v. THE UNITED STATES.

THE COURT OF CLAIMS, 1886.

(21 *Court of Claims*, 340.)

DAVIS, J., delivered the opinion of the court.[1]

The defendants contend that the seizures were justified, as war existed between this country and France during the period in question; and, as we could have no claim against France for seizure of private property in time of war, the claimants could have no resulting claim against their own government; that is, the claims, being invalid, could not form a subject of set-off as it is urged these claims did in the second article of the treaty of 1800. It therefore becomes of great importance to determine whether there was a state of war between the two countries.

It is urged that the political and judicial departments of each government recognized the other as an enemy; that battles were fought and blood shed on the high seas; that property was captured by each from the other and condemned as prize; that diplomatic and consular intercourse was suspended, and that prisoners had been taken by each government from the other and "held for exchange, punishment, or retaliation, according to the laws and usages of war." While these statements may be in substance admitted and constitute very strong evidence of the existence of war, still they are not conclusive, and the facts, even if they existed to the extent claimed, may not be inconsistent with a state of reprisals straining the relations of the states to their utmost tension, daily threatening hostilities of a more serious nature, but still short of that war which abrogates treaties, and after conclusion of which parties must, as between themselves, begin international life anew.

The French issued decree after decree against our peaceful commerce, but, on the ground of military necessity incident to the war with Great Britain and her allies, they refused to receive our minister, but in that refusal, insolent though it was, there is nothing to show that war was intended, and the mere refusal to receive a minister does not in itself constitute a ground for hostilities.

The Attorney-General, Mr. Lee, in August, 1798, very strongly

[1] Facts are wholly omitted and only so much of the opinion is given as relates to the question of reprisals. — ED.

sustained the defendant's position, for he wrote the Secretary of State that there existed with France "not only an actual maritime war," but "a maritime war authorized by both nations;" that consequently France was an enemy, to aid and assist whom would be treason on the part of a citizen of the United States; but we cannot agree that this extreme position was authorized by the facts of the law.

Congress enacted the various statutes hereinafter referred to in detail, and when one of them, the act providing an additional armament, was passed in the House, Edward Livingston, who opposed it, said:

"Let no man flatter himself that the vote which has been given is not a declaration of war. Gentlemen know that this is the case."

Those were times of great excitement; between danger of international contest and heat of internal partisan conflict, statesmen could not look at the situation with the calmness possessed by their successors, and those successors, with some exceptions to be sure, regarded the relations between the countries as not amounting to war.

The question has been carefully examined by authorized and competent officers of the political department of the government, and we may turn to their statements as expository of the view of that branch upon the subject.

In 1827 Senator Holmes reported that there had been "a partial war, but no actual, open war would absolve us from treaty stipulations. * * * It was never understood here that this was such a war as would annul a treaty." 19th Cong., 2d sess., Senate Rep., Feb. 8, 1827, p. 8.

Mr. Giles, reporting to the House of Representatives, as early as 1802, called it a "partial state of hostility" between the United States and France.

Mr. Chambers reported to the Senate in 1828 that, —

"The relations which existed between the two nations in the interval between the passage of the several acts of Congress before referred to and the convention of 1800 were very peculiar, but in the opinion of your committee cannot be considered as placing the two nations in the attitude of a war which would destroy the obligations of previously existing treaties."

Mr. Livingston reported to the Senate in 1830 that, —

"This was not a case of war, and the stipulations which reconciled the two nations was not a treaty of peace; it was a convention for the putting an end to certain differences. * * * Nowhere is the slightest expression on either side that a state of war existed, which would exonerate either party from the obligations of making those indemni-

ties to the other. * * * The convention which was the result of these negotiations is not only in its form different from a treaty of peace, but it contains stipulations which would be disgraceful to our country on the supposition that it terminated a state of war. * * * Neither party considered then they were in a state of war." Rep. 4, 445.

Mr. Everett made a statement to the House of Representatives on the 21st February, 1835, in which he said:

"The extreme violence of the measures of the French Government and the accumulated injuries heaped upon our citizens would have amply justified the government of the United States in a recourse to war; but peaceful remedies and measures of defence were preferred; (and, after referring to the acts of Congress, he adds): These vigorous acts of defence and preparation, evincing that, if necessary, the United States were determined to proceed still further and go to war for the protection of their citizens, had the happy effect of precluding a resort to that extreme measure of redress."

Finally, Mr. Sumner considered the acts of Congress as "vigorous measures," putting the country "in an attitude of defence;" and that the "painful condition of things, though naturally causing great anxiety, did not constitute war." 38th Cong., 1st sess., Rep. 41, 1864.

The judiciary also had occasion to consider the situation, and the learned counsel for the defendants cites us to the opinion of Mr. Justice Moore, delivered in the case of *Bass* v. *Tingy*, 4 Dall. 37, wherein the facts were as follows: Tingy, commander of the public armed ship the *Ganges*, had libelled the American ship *Eliza*, Bass, master, setting forth that she had been taken on the high seas by a French privateer the 31st March, 1799, and retaken by him late in the following April, wherefore salvage was claimed and allowed below. Upon appeal the judgment was affirmed. Each of the four justices present delivered an opinion.

Justice Moore, answering the contention that the word "enemy" could not be applied to the French, says:

"How can the character of the parties engaged in hostility of war be otherwise described than by the denomination of enemies? It is for the honor and dignity of both nations, therefore, they should be called enemies; for it is by that description alone that either could justify or excuse the scene of bloodshed, depredation, and confiscation which has unhappily occurred, and surely Congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy."

Justice Washington considers the very point now in dispute, saying (p. 40):

"The decision of the question must depend upon * * * whether at the time of passing the act of Congress of the 2d of March, 1799, there subsisted a state of war between two nations. It may, I believe, be safely laid down that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be decreed in form it is called solemn and is of the perfect kind, because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against the members of the other in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act under special authority and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the government retains the general power."

Applying this rule he held that "an American and French armed vessel, combating on the high seas, were enemies," but added that France was not styled "an enemy" in the statutes, because the degree of hostility meant to be carried on was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by Congress might have constituted a perfect state of war which was not intended by the government.

Justice Chase, who had tried the case below, said:

"It is a limited, partial war. Congress has not declared war in general terms, but Congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land, to capture unarmed French vessels, nor even to capture armed French vessels in a French port, and the authority is not given indiscriminately to every citizen of America against every citizen of France, but only to citizens appointed by commissions or exposed to immediate outrage and violence. * * * If Congress had chosen to declare a general war, France would have been a general enemy; having chosen to wage a partial war, France was * * * only a partial enemy."

Justice Patterson concurred, holding that the United States and France were "in a qualified state of hostility" — war "*quoad hoc.*"

As far as Congress tolerated and authorized it, so far might we proceed in hostile operations, and the word "enemy" proceeds the full length of this qualified war, and no further.

The Supreme Court, therefore, held the state of affairs now under discussion to constitute partial warfare, limited by the acts of Congress.

The instructions of Ellsworth, Davie, and Murray, dated Oct. 22, 1799, did not recognize a state of war as existing, or as having existed, for they said the conduct of France would have justified an immediate declaration of war, but the United States, desirous of maintaining peace, contented themselves "with preparations for defence and measures calculated to defend their commerce." Doc. 102, p. 561. Yet all the measures relied upon as evidence of existing war had taken effect prior to the date of these instructions. So the ministers, in a communication to the French authorities, said, as to the acts of Congress, "which the hard alternative of abandoning their commerce to ruin imposed," that "far from contemplating a co-operation with the enemies of the Republic (they) did not even authorize reprisals upon her merchantmen, but were restricted simply to the giving of safety to their own, till a moment should arrive when their sufferings could be heard and redressed." Doc. 102, p. 583.

France did not consider that war existed, for the minister said that the suspension of his functions was not to be regarded as a rupture between the countries, "but as a mark of just discontent" (15 Nov., 1796, Foreign Relations, Vol. I. p. 583), while J. Bonaparte and his colleagues termed it a "transient misunderstanding" (Doc. 102, p. 590), a state of "misunderstanding" which had existed "through the acts of some agents rather than by the will of the respective 'governments,'" and which had not been a state of war, at least on the side of France. Ib. 616.

The opinion of Congress at this time is best gleaned from the laws which it passed. The important statute in this connection is that of May 28, 1798 (1 Stat. L. 561), entitled "An Act more effectually to protect the commerce and coasts of the United States." Certainly there was nothing aggressive or warlike in this title.

The act recites that, whereas the French armed vessels have committed depredations on American commerce in violation of the law of nations and treaties between the United States and France, the President is authorized — not to declare war, but to direct naval commanders to bring into our ports, to be proceeded against according to the law of nations, any such vessels "which shall have committed, or which shall be found hovering on the coasts of the United States for the purpose of committing, depredations on the vessels belonging to

the citizens thereof; and also to retake any ship or vessel of any citizen or citizens of the United States which may have been captured by any such armed vessel."

This law contains no declaration or threat of war; it is distinctly an act to protect our coasts and commerce. It says that our vessels may arrest a vessel raiding or intending to raid upon that commerce, and that such vessel shall not be either held by an executive authority or confiscated, but turned over to the admiralty courts — recognized international tribunals — for trial, not according to municipal statutes, as was being done in France, but according to the law of nations. Such a statute hardly seems necessary, for if it extended at all the police powers of naval commanders upon the high seas it was in the very slightest degree, and it is hardly probable then or now, with or without specific statutory or other authority, an American naval commander would in fact allow a vessel rightfully flying the flag of the United States to be seized on the high seas or near our coasts by the cruisers of another government. But if the act did enlarge the power of such officers, and give to them authority not theretofore possessed, it tied them down to specific action in regard to specified vessels.

They might seize armed vessels only, and only those armed vessels which had already committed depredations, or those which were on our coast for the purpose of committing depredations, and they might retake an American vessel captured by such an armed vessel. This statute is a fair illustration of the class of laws enacted at this time; they directed suspension of commercial relations until the end of the next session of Congress, not indefinitely (June 13, 1798, ib. § 4, p. 566); they gave power to the President to apprehend the subjects of hostile nations whenever he should make "public proclamations" of war (July 6, 1798, ib. 577), and no such proclamation was made; they gave him authority to instruct our armed vessels to seize French "armed," not merchant, vessels (July 9, 1798, ib. 578), together with contingent authority to augment the army in case war should break out or in case of imminent danger of invasion. March 2, 1799, ib. 525. Within a few months after this last act of Congress the Ellsworth mission was on its way to France to begin the negotiations which resulted in the treaty of 1800, and even the act abrogating the treaties of 1778 does not speak of war as existing, but of "the systems of predatory violence * * * hostile to the rights of a free and independent nation." July 7, 1798, ib. 578.

If war existed, why authorize our armed vessels to seize French armed vessels? War itself gave that right, as well as the right to seize merchantmen, which the statutes did not permit. If war existed, why empower the President to apprehend foreign enemies? War it-

self placed that duty upon him as a necessary and inherent incident of military command. Why, if there was war, should a suspension of commercial intercourse be authorized, for what more complete suspension of that intercourse could there be than the very fact of war? And why, if war did exist, should the President, so late as March, 1799, be empowered to increase the army upon one of two conditions, viz., that war should break out or invasion be imminent, that is, if war should break out in the future or invasion become imminent in the future?

Upon these acts of Congress alone it seems difficult to found a state of war up to March, 1799, while in February, 1800, we find a statute suspending enlistments, unless, during the recess of Congress, "war should break out with France." This is proof positive that Congress did not then consider war as existing, and in fact Ellsworth, Davie, and Murray were at the time hard at work in Paris. In May following the President was instructed to suspend action under the act providing for military organization, although the treaty was not concluded until the following September.

This legislation shows that war was imminent; that protection of our commerce was ordered, but distinctly shows that, in the opinion of the legislature, war did not in fact exist.

Wheaton draws a distinction between two classes of war, saying:

"A perfect war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case, and under every circumstance permitted by the general laws of war. An imperfect war is limited as to places, persons, and things (to which the editor adds): Such were the limited hostilities authorized by the United States against France in 1798." Lawrence's Wheaton, 518.

There was no declaration of war; the tribunals of each country were open to the other — an impossibility were war in progress; diplomatic and commercial intercourse were admittedly suspended; but during many years there was no intercourse between England and Mexico, which were not at war; there was retaliation and reprisal, but such retaliations and reprisals have often occurred between nations at peace; there was a near approach to war, but at no time was one of the nations turned into an enemy of the other in such manner that every citizen of one became the enemy of every citizen of the other; finally, there was not that kind of war which abrogated treaties and wiped out, at least temporarily, all pending rights and contracts, individual and national.

In cases like this "the judicial is bound to follow the action of the political department of the government, and is concluded by it"

(*Phillips* v. *Phillips*, 92 U. S. R. 130); and we do not find an act of Congress or of the executive between the years 1793 and 1801 which recognizes an existing state of solemn war, although we find statutory provisions authorizing a certain course "in the event of a declaration of war," or "whenever there shall be declared war," or during the existing "differences." One act provides for the increase of the army "in case war shall break out," while another restrains this increase "unless war shall break out." 1 Stat. L. 558, 577, 725, 750; see, also, acts of Feb. 10, 1800, and May 14, 1800.

We have already referred to the instructions of the executive, which show that branch of the government in thorough accord with the legislature on this subject, and the negotiations of our representatives hereinafter referred to were marked by the same views, while the treaty itself — a treaty of amity and commerce of limited duration — is strong proof that what were called "differences" did not amount to war. We are, therefore, of the opinion that no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations; that, in short, there was no public general war, but limited war, in its nature similar to a prolonged series of reprisals.[1]

[1] The Court of Claims reconsidered this question in *Hooper, Adm'r,* v. *U. S.*, 1887, 22 Ct. Cl. 408, 456, with the following result:

"Acts of retaliation are admitted to be justifiable under certain conditions. They may exist when the two nations are otherwise at peace, but they are in their nature acts of warfare. They depart from the field of negotiation into that of force, and, as is war, are justified by a successful result. To term the decrees of France and the acts of their privateers under them 'acts of reprisal,' does not alter the facts or the legal position. That position has been defined by the Supreme Court of the United States as limited, partial war. We, following the path indicated by that tribunal, have defined it as 'limited war in its nature similar to a prolonged series of reprisals.'"

"Acts of retorsion are not acts of war; they are pacific. When resorted to between independent states, they are intended to prevent the necessity of resorting to war. Nor can the passing of such an act be considered a granting of *letters of marque and reprisal.* Letters of marque and reprisal are a commission to attack the subjects of a foreign state on the high seas beyond the limits of the state, seize their property, and put it in sequestration. It is a hostile act of aggression. Martens, Law of Nations, 270; 1 Black. Com. 258. These terms were perfectly understood by the framers of our Constitution, and they are used in the sense in which they are ordinarily understood by enlightened jurists." Wood, *arguendo* in *Gibbons* v. *Livingston*, 1822, 6 N. J. L. 236, 255.

"Letters of marque and reprisal may theoretically issue in time of peace (articles of Confederation signed 1778, art. 9), as they form a 'mode of redress for some specific injury which is considered to be compatible with a state of peace and permitted by the law of nations.' Kent, Vol. I. p. 61. The commission authorizes 'the seizure of the property of the subjects as well as of the sovereign of the offending nation and to bring it in to be detained as a pledge, or disposed of under judicial sanction in like manner as if it were a process of distress under national authority for some debt or duty withheld.' Ibid. Speaking very technically, a letter of marque is merely a permission

Section 25. — Hostile Embargo.

THE "BOEDES LUST."

High Court of Admiralty, 1803.

(5 *C. Robinson*, 245)

This was the case of a Dutch ship on a voyage from Demerara to Batavia, embargoed at the Cape of Good Hope by an English squadron before the actual declaration of war against Holland in 1803, and afterwards condemned as enemy's property. An extract follows from

to pass the frontier, while a letter of reprisal authorizes a 'taking in return,' a taking by way of retaliation, a *captio rei unius in alterius satisfactionem*. The colloquial use together of the two names, letter of marque and letter of reprisal, leads sometimes to misunderstanding as to the differing effect of each, one being simply an authority to depart, the other an authority to seize property in compensation for an injury committed." Davis, J., in *Hooper, Adm'r*, v. *U. S.*, 1867, 22 Ct. Cl. 408, 429.

"Reprisals may be granted for injuries to private citizens as well as to the State, and when done by foreign individuals as well as when by public authority. The granting of letters of reprisal (not of marque and reprisal) to citizens injured by private hands, to remunerate themselves by reprisals on private property of any citizens of the nation of the wrongdoer, has been reprobated by the best modern writers, and discountenanced by the practice of nations. It entails all the responsibilities of national acts, with none of their political or moral securities. Stephen's Blackstone, ii. 516. Phillimore, iii. 22. Woolsey, § 114. Halleck, 298, § 12. Especially is it true, that, for injuries done directly to the state, letters of *general* reprisal are not now issued to private persons in time of peace. The issuing of such letters would now be considered an act of war. Kent, i. 61. Halleck, 299. Phillimore, iii. 24–36, contains a summary of the chief modern instances of general reprisals.

"The right of making reprisals is not limited to property, but extends to persons. Still, the practice of modern times discountenances the arrest and detention of innocent persons, strictly in the way of reprisal. Halleck, 301, § 16. Phillimore, iii. 23.

"By the later usage of speech, the term "letter of marque" seems to be confined to the authorization to private armed trading vessels to make captures of property of the enemy in war. If there is no declared or recognized *status* of war, and the government, for a public purpose, desires to seize property, in the way of security or warning or specific retaliation, such authorization to such vessels would be called 'letters of reprisal,' or 'letters of marque and reprisal.' If, in time of war, the private vessel receiving the authorization is fitted out and employed solely as a cruiser, she is called a 'privateer.'

"It is agreed that reprisals for private wrongs should never be resorted to by a government until all reasonable appeals to the government of the wrongdoer have been exhausted. The course of the British Government in the case of Pacifico, in making reprisals against Greece, has been condemned, not only because the preliminary methods had not been exhausted, but because of the extortionate character of the

the judgment of Sir W. Scott: — This was the state of the first seizure. It was at first equivocal; and if the matter in dispute had terminated

demand made against a power incapable of resistance. Phillimore, iii. 29–33. Halleck, 298, § 11.

"The remedy of *retorsion*, where there is no recognized war, is distinguished from strict reprisals. It is the application of the *lex talionis* to nations, and is confined to cases of the violation of mere comity, or of the imperfect obligations. It is not proper to resort to specific retaliation for cases of serious injury and injustice. The tendency of modern times is to put everything which may result in public international controversy directly into the hands of the government, and to confine all acts of force to public military officers, and to simplify these acts of force into acts of war, either special and preliminary, or general. Woolsey, § 114. Halleck, 296, § 10. Kent, i. 93, 94. Manning, 105. Klüber, § 234. Heffter, §§ 110, 111. Phillimore, iii. 8.

"By treaties and the practice of nations, the making of reprisals is now confined to the seizure of commercial property on the high seas, by public cruisers, or private cruisers specially authorized thereto. Heffter, § 110." Dana's Wheaton, note No. 151.

And for instances in which the United States has acted by way of reprisal, see Lawrence's Wheaton, p. 507, note 168.

In considering the admissibility of reprisals, Attorney-General Randolph says: "I appeal to the British reasoning on the Silesia loan [1752] as supporting this sentiment, in the following passages: 'The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, do not allow of reprisals, except in cases of violent injuries directed and supported by the State, and justice absolutely denied, *in re minime dubiâ*, by all tribunals, and afterward by the prince.' Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions, different men think and judge differently; and all a friend can desire is, that justice should be as impartially administered to him as it is to the subjects of that prince in whose courts the matter is tried. Under such circumstances a citizen must acquiesce." 1 Op. Atty-Gen. 1793.

For the facts of the *Silesian Loan Case*, the importance of which rests more upon the able exposition of the law of maritime capture than upon the question of reprisals, see the long account in 2 Martens, Causes Célèbres, 97, or the brief note in Hall, Int. Law, 454.

In the case of *Don Pacifico*, 1850, frequently cited as an instance of reprisals, the facts were briefly: Pacifico was by race a Jew, by birth a British subject, residing at Athens, Greece. It was customary at Athens to burn "Judas Iscariot" in effigy at Easter. This the authorities, in 1847, attempted to prevent, owing to the presence of Mr. Charles de Rothschild in Athens. The mob resented the action of the authorities and vented its disappointment on Don Pacifico. His house was attacked and plundered. He generously estimated his loss at £26,000, and it seems lodged a complaint with the Greek Government, which however, took no action. Feeling that a Jew would have little or no chance of justice in the Greek courts, Pacifico appealed to the British Government which interfered and demanded compensation for the injuries done to a British subject. On the failure of the Greek Government to meet the demand, the British admiral laid an embargo on all Greek merchant vessels in Greek ports and captured and detained such as were found upon the sea. Pacifico's claim was ultimately laid before certain commissioners who assessed his damages at £150.

Don Pacifico has usually been represented as an adventurer who had little claim upon the sympathy of his fellow-men; and England has generally been severely

in reconciliation, the seizure would have been converted into a mere civil embargo. That would have been the retroactive effect of that

criticised for supporting his claim. Yet if he was a British subject, he had a right to be protected as such. He was born in British territory, Gibraltar, and his father was born in London. His letters relating to this affair are dignified, and show much ability. His chief crime would seem to have been that of being a Jew. The argument that Pacifico ought to have resorted to the ordinary courts of Greece to obtain his indemnity is quite untenable. What chance of success would he have had in a suit against a mob of several hundred persons, to him unknown, and with public opinion against him? Indeed he brought the matter to the notice of the judiciary department of the government; and it was then the duty of the government to take further proceedings. The fact would seem to be that the whole trouble lay in the weak and vacillating policy of the Greek Government, which could easily have avoided all trouble by simply doing justice to M. Pacifico and the other claimants. Whether the British Government was justified in resorting to such extreme measures may be questioned; but that some action was called for there can be little doubt.

See further the case of *Van Brokelen*, 1888, 2 Moore Intr. Arb. 1807–1853 in which the United States intervened in behalf of Van Brokelen on the ground that the Haytian courts unduly discriminated against him; *The Costa Rica Packet*, 1897, 5 Moore, id. 4948–4954, in which Great Britain intervened in behalf of one Carpenter against Holland, on the ground that no real cause was shown for his arrest, and that the treatment to which he was subjected in prison appeared "to be unjustifiable in view of his being the subject of a civilized state," per F. de Martens, arbiter.

The following judicious passage from the judgment of Drake, C. J., in *Hubbell et al.* v. *U. S.*, 1879, 15 Ct. Cl. 546, 608, throws light on this subject: "A nation is not ordinarily esteemed to be liable internationally for injury done to the property of foreigners within its jurisdiction. If Chinese property is destroyed in California, or a British vessel pillaged by wreckers in Alaska, international responsibility in damages does not necessarily follow. By the comity of nations it is assumed that the civil power acts in good faith; that its laws in their ordinary operation afford requisite protection; and if that protection fails its courts furnish the means to procure compensation and to punish the wrongdoer. A foreigner who resides within a country is only entitled to enjoy the same protection and the same indemnity which are accorded to the citizen or subjects. Mr. Webster to Mr. Calderon, Nov. 13, 1851. When the courts of the country are so bad or so corrupt as to excuse resorting to them; or when all redress through them has failed; or when a despotism affords no protection to natives; or when the injured nation has determined to question the good faith of the other power, a case arises for an international reclamation for such a cause."

The bombardment of Greytown, 1854, is an American precedent. "Greytown was a port on the Mosquito coast, in which some United States citizens resided. These citizens, and others interested with them in business, were subjected to gross indignities and injuries by the local authorities, who were British, but who professed to act under authority from the king or chief of the Mosquito Islands. The parties injured accordingly appealed to the commander of the United States sloop-of-war *Cyane*, then lying near that port, for protection. To punish the authorities for their action, he bombarded the town. For this act he was denounced by the British residents, who claimed that the British Government had a protectorate over that region. His action was sustained by the government of the United States, the ground being the necessity, of punishing in this way a great wrong to citizens of the United States, and preventing its continuance." 1 Wharton's Digest, p. 229, and II. p. 595.

A favorite form of reprisal in coercing weaker states has been by what are called

course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be no embargo, it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus*, by which it was done, that it was done *hostili animo* and is to be considered as an hostile measure *ab initio*. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. No such convention is set up on either side, and the state, by directing proceedings against this property for condemnation, has signified a contrary intention. Accordingly the general mass of Dutch property has been condemned on this retroactive effect; and this property stands upon the same footing.[1]

"pacific blockades:" thus, in 1827, "the coasts of Greece were blockaded by the English, French, and Russian squadrons, while the three powers professed to be at peace with Turkey."

"The Tagus was blockaded by France in 1831, New Granada by England in 1861, Mexico by France, in 1838, and La Plata from 1838 to 1840 by France, and from 1845 to 1848 by France and England." Hall's Int. Law, 386.

In like manner, without a declaration of war, France blockaded the Island of Formosa, in 1884, and in 1893, the coast of Siam. In 1886 Greece was blockaded by the fleets of nearly all the great European powers, and in 1897 Crete was "pacifically" blockaded by the use of cannon.

Retorsion, as in the case of differential import duties, is a matter of municipal law and municipal policy, and though unfriendly in its nature, it is certainly not hostile. The case is different with reprisals; they are an appeal from reason to force. A pacific blockade is pacific in name and in fact only so far as it is an effort by the display of organized force to preserve peace. It is, however, recognized in international law, provided that the interests of neutrals are not affected. See Hall's Int. Law, 381–390, and the singularly felicitous treatment of the subject of pacific blockades, in Holland's Studies in Int. Law, 1898, pp. 130–150. — Ed.

[1] The object of a hostile embargo may be by way of reprisal to obtain satisfaction for an alleged injury; or, it may be, in the expectation of the outbreak of war, to get possession of property which will presumably be hostile, for the purpose of confiscating it later — after the actual outbreak of war. Although the government might restore such property at the breaking out of war, it has not been the practice to do so; and hence, as Dana says, embargo "refers itself directly to the question of the right, on breaking out of war, to seize ships and cargoes found in port." Dana's Wheaton, p. 372, note.

In the case of *Lindo* v. *Rodney*, 1781, Douglas, 615, Lord Mansfield said: "Ships not knowing of hostilities come in by mistake; upon the declaration of war, or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made."

The earlier writers upon international law do not mention embargo, at least in the sense of hostile embargo. Until towards the end of the last century, there was really no

Section 26. — War: Purpose and Declaration.

UNITED STATES v. THE "ACTIVE."

United States District Court, Territory of Mississippi, 1814.

(24 *Federal Cases*, 755.)

In 1814, during the war between Great Britain and the United States, the *Active* and its cargo belonging to the enemy was taken in sight of the fort at Mobile Point by troops stationed at that place under the command of Major William Lawrence. A libel was filed

distinction made between property found on land and that found afloat. In both cases it was liable to capture. At the time of Bynkershoek and of Vattel, private property of the enemy was confiscated, though some treaties had exempted it from seizure at the commencement of war. Bynkershoek, I. chapter II. Bynkershoek mentions many cases, too, where it was seized before the declaration of war. It was left to the English admiralty courts to formulate the practice into legal maxims by their decisions. As to the retroactive effect of a declaration of war as applied by the courts, it is apparently a necessary invention of Sir William Scott to legalize a practice already in vogue.

Dr. Lushington said in the *Johanna Emilie*, 1854, Spinks, 14, "With regard to an enemy's property coming to any part of the kingdom, *or being found there*, being seizable, I confess I am astonished that doubt should exist on the subject. I apprehend the law has been this, that it is competent for any person to take possession of such property, unless it had any protection by license, or by some declaration emanating by the authority of the Crown, and to assist the Crown to proceed against it to adjudication."

At the breaking out of the Crimean War in 1854, merchant vessels of the enemy were allowed by the belligerents six weeks for loading their cargoes and departing. And, further, vessels of the same character sailing from foreign ports prior to the promulgation of these orders, were allowed to enter the ports of the enemy and discharge their cargoes and to depart. The initiation of this modification of the old rule in this war seems to have been taken by Turkey in her declaration of war against Russia, October 4, 1853. "The Sublime Porte, however, does not consider it just that, agreeable to ancient usage, an embargo should be laid on Russian merchant vessels. Accordingly they will be warned to proceed within a period to be fixed hereafter to the Black Sea or to the Mediterranean, as they choose." See 1 Halleck, 533; Hertslet, II. 1176.

In the recent war with Spain, the President's proclamation of April 26, 1898, provided as follows: "4. Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21st, 1898, inclusive, for loading their cargoes and departing from such ports and places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, upon examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or

in the name of the United States against the schooner *Active* and cargo to procure their condemnation as prize of war, to which a plea was filed on behalf of the captors alleging that the "schooner *Active* and cargo were captured by William Lawrence and others on the high seas, and not in the enemy's forts, camps, or barracks, and, therefore, by the usages of the laws of nations and the laws of war, as enemy's property become forfeited to the said private captors." The question before the court was: Are the troops thus making a prize entitled by law to the benefit of it?

TOULMAN, J.[1] The most satisfactory mode probably of coming to a conclusion on this subject will be to have recourse to general principles.

1. What is war? "It is a contest," says Bynkershoek, "carried on between independent persons for the sake of asserting their rights." Where society does not exist — where there is no such institution as that which we call government — these individuals, being strictly independent persons, may carry on war against each other. But whenever men are formed into a social body, war cannot exist between individuals. The use of force among them is not war, but a trespass, cognizable by the municipal law. Bynk. War, p. 128. If war, then, be the act of the nation, whatever is done in the prosecution of it, must either expressly or implicitly be under the national authority. Whatever private benefits result from it must be from a national grant. "War," says Vattel (page 368), "is that state in which a nation prosecutes its right by force." The right of making war belongs alone to the sovereign power. Individuals cannot control operations of war, nor commit any hostility (except in self-defence), without the sovereign's order. The generals (adds that writer), the officers, the soldiers, the partisans, and those who fit out private ships of war, having all commissions from the sovereign, make war by virtue of a particular order. And the necessity of a particular

naval service of the enemy; or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government." 10 Richardson's Messages and Papers, 204. For a liberal interpretation extending the terms of the proclamation to Spanish vessels sailing from American ports before, but captured after, the declaration of war, see *The Buena Ventura*, 1899, 175 U. S. 384.

The departure from the old rule in this case, coupled with the numerous treaties stipulating for time for the removal of vessels in case of war, go far towards creating that change of practice which ultimately changes the law of nations. Dana's Wheaton, note No. 156.

For the various civil embargo and non-intercourse acts of the United States, and their judicial interpretation, see 3 Wharton's Digest, §§ 319, 320; 16 Am. & Eng. Ency. of Law, 2d ed. 1139, notes 2, 3. — ED.

[1] Only that part of the opinion relating to general principles is given. — ED.

order is so thoroughly established, that even after a declaration of war between two nations, if the peasants themselves commit any hostilities, the enemy, instead of sparing them, hangs them up as so many robbers or banditti. This is the case with private ships of war. It is only in virtue of a commission granted by the sovereign or his admiralty, that they are entitled to be treated like prisoners taken in a formal war. Vatt. Law Nat. pp. 365, 366. If, then, on the general principles of civil society, the whole operations of war depend upon the will and authority of the government, surely the appropriation and distribution of the property acquired in consequence of those operations must equally be subject to the control of the government, and depend on those regulations which it may establish.

2. What, indeed, is the object of war?

Is it to aggrandize individuals, or is it to maintain the rights of the nation? "The just and lawful scope of every war," observes Vattel (page 280), "is to revenge or prevent injury. If, to accomplish this object, it is expedient to encourage individual warfare, by granting all the profits arising from it to the parties engaged, the nation has a right to promise this encouragement; but until this encouragement be actually offered, it must follow that everything which is required by individuals, whether acting as private persons or as a part of the public force, must belong to the nation under whose authority they act."

4. What rights are acquired by a state of war? "A nation," says Bynkershoek (page 4), "who has injured another is considered, with everything that belongs to it, as being confiscated to the nation which receives the injury." The rights accruing, therefore, are national altogether. They are not individual rights. The case seems analogous to that of the internal administration of justice. A civil society — a nation — has the right of punishing those who are guilty of violating the public laws. Though the guilty be members of their own community, they may forfeit their property or their lives. But the right of the body politic does not attach itself to the individual members of it. The nation, indeed, might authorize individuals to take the lives or the property of known offenders; but, without an authority delegated by the nation, individuals have no such right. A right in private persons to avenge violations of the law does not follow as a natural consequence from the circumstance of their being members of the great political body. On the contrary, the same act which would be retributive justice when emanating from the sovereign power would become murder or robbery in the individual. Why should it be otherwise, as it regards our intercourse with other nations? Why should a nation be less jealous of its rights with

regard to hostile nations than with regard to hostile individuals? Why less jealous when encroached upon on a large scale than when they are encroached upon on a scale truly small and insignificant? And even admitting that in the one case the public authority permits an individual to execute the sentence of the law, and in the other to attack and vanquish the public enemy, it will not follow that in either case the property of the enemy is to become the property of the individual by whom the national will is carried into execution. This, it should seem, must depend on express stipulations made in behalf of the nation. Agreeably to these principles, the celebrated M. De Vattel, after observing that a nation has the right to deprive the enemy of his possessions and goods, of everything that may augment his forces and enable him to make war, goes on to remark, that booty, or the movable property of the enemy taken in war, belongs to that sovereign making war, no less than his towns and lands: for he alone (the sovereign authority) has such claims against the enemy as warrant him to seize on his goods, and appropriate them to himself. His soldiers (he adds) are only instruments in his hand, for asserting his right. He maintains and forms them. Whatever they do is in his name and for him. Vatt. Law Nat. 335. These principles are equally applicable to every form of government. It is perfectly immaterial with whom the sovereign authority resides. With whomsoever it resides, its power is erected on the doctrine of its being the legitimate representative of the nation; and the rights of the nation are not surely to be considered as being less, under a republican, than under a monarchical form of government.

The nation, however, as I have observed before, may give a bounty to individual captors — may relinquish a part of its rights to those who fight under its banners. Agreeably to this the same writer goes on to observe that "the sovereign may grant to the troops what share of the booty he pleases. At present most nations allow whatever they can make on certain occasions, when the general allows of plundering what they find on enemies fallen in battle; the pillage of a camp when it has been forced and sometimes of a town taken by assault." The cases here enumerated seem to be those where either the object was too trifling to become a matter of national attention, or where the services previously rendered by the troops call for a degree of vigor and exertion which would merit extraordinary encouragement. The whole, however, is made to depend on the will of the nation expressed through their commanding general.

I have been more particular in stating the principles laid down by writers on the law of nations (or the dictates of justice and common sense, as applied to national intercourse), because the attorney for

the claimant, whilst acknowledging that the laws of the United States are silent on the present case, places a great reliance on the injunctions of national law. It is contended that the law of nations gives the booty in this case to the captors.

What, indeed, is the law of nations? It is that rule of conduct which regulates the intercourse of nations with one another; or in the words of the author last cited, "the law of nations is the science of the law subsisting between nations or states, and of the obligations that flow from it." Vatt. Law Nat. 49. It is a law for the government of national communities as to their mutual relations, and not for the government of individuals of those communities in their relation towards one another — nor can it control the conduct of nations towards their own citizens, except in cases involving the rights of other nations. Property once transferred by capture must be subject to the laws of the nation by which the capture is made. The question whether it shall be public or private property must depend on the regulations adopted by the nation making the capture, and cannot naturally be regarded as subject to the control of a system of laws which has respect to the laws and duties of nations towards one another. What our author states as to the practice of nations towards their own citizens, is not, truly speaking, a delineation of the laws of nations. The conduct of nations towards their own citizens must depend on their own municipal regulations. It is by the laws of nations that we must determine the circumstances under which prizes may be taken, but what is to become of them when taken under the sanction of that law cannot depend upon the law of nations, but must depend upon the will of the nation by which the capture is made. Individuals of the capturing nation can have no right independent of the nation to which they belong. It is by a reliance upon the authority of their nation, that they shelter themselves from the charge of robbery or piracy. The sovereign, however, may distribute the booty as he pleases. He may do it by a general law, or by special regulations, issued by his generals, subject to the emergency of the case; provided that the government permits of such a delegation of authority. Even the property acquired by privateers depends on stipulations made with the supreme power of the country to which they belong. "Persons," says Vattel (page 367), "fitting out ships to cruise on the enemy, in recompense of their disbursements and risk they run, acquire the property of the capture; but they acquire it by grants of the sovereign who issues out commissions to them. The sovereign either gives up to them the whole capture or a part — this depends on the contract between them." Vatt. Law Nat. p. 367. As to those who without any authority from their sovereign, commit

depredations by sea or land, they are regarded as pirates and plunderers, and things taken by them do not thereby undergo a change of property. Bynk. p. 127.

Agreeably to this statement (*Lord Camden* v. *Home*, 4 Term R. 387), we find that Sir William Scott granted a munition against the master and owner of a privateer not commissioned against the Dutch, to bring in proceeds of a Dutch prize. The party appearing acknowledged that he had no commission, but prayed to be admitted as a joint captor. The court did not even suffer the case to be argued, but observed: "The person admits that he had no commission. It is therefore impossible for him to contend for a legal interest in joint capture. If he thinks he has any equitable claims, arising from any service he has performed, they may be represented to the admiralty. The former proceedings (of condemnation at Jamaica) on the part of the non-commissioned captor are mere nullities; and the property must be proceeded against as *droits* of admiralty." 4 C. Rob. Adm. 72. The case of the *Rebeckah*, which was a question of interest in the capture of a vessel made by naval officers from the island of St. Marcou, a naval station, used for the temporary accommodation of the crews of ships of war, gave occasion to remarks from Sir William Scott, very applicable to the case now before me. "I accede," says he, "entirely to what has been laid down, that a capture at sea, made by a force upon land (which is a case certainly possible, though not frequent), is considered generally as a non-commissioned capture, and inures to the benefit of the lord high admiral. Thus, if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon land, that ship would be a *droit* of admiralty, and the garrison must be content to take a reward from the bounty of the admiralty, and not a prize interest, under the king's proclamation. All title to sea-prize must be derived from commissions under the admiralty, which is the great fountain of maritime authority; and a military force upon the land is not invested with any commission so derived, impressing on them a maritime character, and authorizing them to take, upon that element, for their own benefit. I likewise think cases may occur in which naval persons, having a real authority to take upon the sea for their own advantage, might yet entitle the admiralty, and not themselves, by a capture made upon the sea, by the use of a force stationed upon the land. Suppose the crew, or part of the crew, of a man-of-war were landed, and descried a ship of the enemy at sea, and that they took possession of any battery or fort upon the shore, and by means thereof, compelled such ship to strike. I have no doubt that such a capture, though made by persons having naval commissions, yet being

made by means of a force upon the land, would be a *droit* of admiralty, and nothing more." C. Rob. Adm. 227.

The only question, then, which remains to be considered is, have the laws of the United States given to the military any share in prizes taken by troops so circumstanced?

As to the laws of the United States respecting property captured by the public force, the most material is the act of the 23d April, 1800, for the better government of the navy. This act gives to the captors the proceeds of vessels and goods taken on board of them when adjudged good prize. But this act is a law expressly for the government of the navy of the United States; and, indeed, it does not appear to be contended that it can by any rule of construction be extended to the army. Private commissoned vessels, in like manner, deserve their right to appropriate to themselves the prizes they make, from the "act concerning letters of marque, prizes, and prize goods," passed on the 26th day of June, 1812. This act, after stating the conditions on which authority should be given to our vessels to capture the vessels and property of the enemy, proceeds to vest the same, when taken under such authority, in the owners, officers, and crews of the vessels by which prizes should be made. 11 Laws (Weightman's ed.), p. 240 (2 Stat. 759). Had it been the intention of the government that non-commissioned vessels should be entitled to the proceeds of prizes made, or that any person in the employ of the United States, and not belonging to the navy or marines, should be entitled to the benefit of all enemy's property taken by them, it would surely have been natural that such intention should have been expressed in these or some other legislative acts. Moreover, indeed, it does not appear what occasion there could be to provide regulations and bonds for the government and good conduct of vessels applying for commissions to make prizes; if all vessels of any description were authorized to take and to appropriate to their own use the property of the enemy, merely because, as it hath been contended, the fortune of war had thrown it in their way.

In the whole view of the case, therefore, now before the court, it is adjudged and decreed, that the plea be overruled, and dismissed, with costs in court occasioned by the plea, and that the schooner *Active* and cargo be condemned as good and lawful prize of the United States.

Davis, J., in *Dole* v. *Merchant's Mutual Marine Ins. Co.*, 1863, 51 Maine, 465, 470. That they were liable to be regarded as "enemies," is undoubtedly true. This implies the existence of "war." But every forcible contest between two governments, *de facto* or *de jure*, is war. War is an existing *fact*, and not a legislative decree. Congress alone may have power to "declare" it *beforehand*, and thus

cause or commence it. But it may be initiated by other nations, or by traitors; and then it *exists*, whether there is a declaration of it or not. It may be prosecuted without any declaration; or Congress may, as in the Mexican war, declare its previous existence. In either case it is the *fact* that makes "*enemies*," and not any legislative act.[1]

THE "TEUTONIA."

PRIVY COUNCIL, 1870.

(*Law Reports*, 4 *Privy Council*, 171.)

Lord Justice MELLISH. "This is an appeal in a cause instituted under the 6th section of the Admiralty Court Act, 1861, on behalf of Messrs. Duncan, Fox & Co., the consignees of a bill of lading of the cargo laden on board the ship *Teutonia*, against that ship and her freight, and against the owner of the vessel.

The *Teutonia* was a Prussian brig, subject to the laws of Prussia, and her master and crew were subjects of the King of Prussia.

And by the charter-party referred to in the bill of lading it was agreed that, "after receiving on board the said cargo, the said vessel shall proceed either to Cork, Cowes, or Falmouth, at the option of the master, where he shall receive orders from charterer's agents within three days after his arrival to proceed to any one safe port in Great Britain or on the Continent between Havre and Hamburgh, both included, and there, according to bills of lading and charter-party, deliver the cargo, the act of God, the Queen's enemies, fire, and all and every other risk, dangers, and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, freight to be paid in manner herein mentioned on a true and right delivery of the cargo in the port of discharge at and after the rate of 45*s*. British sterling per ton."

The vessel arrived at Falmouth on 10th of July; and the master, whilst there, heard rumours that war was probable between France and Prussia. On the 11th of July, the master received orders from the consignees to discharge the cargo at Dunkirk; and he at once set sail for Dunkirk, and arrived at a distance of about fourteen miles off that port, at 12 o'clock at night of the 16th, which was a Saturday; and the master says that, after lying to for about two

[1] For the twofold division of hostilities into "perfect" and "imperfect" war, see *Bas* v. *Tingy*, 1800, 4 Dall. 37, cited in *Gray's Adm.* v. *U. S.*, 1886, 21 Ct. Cl. 340, § 24, *ante*, and *Talbot* v. *Seeman*, 1801, 1 Cr. 1. — ED.

hours, a regular pilot, in official uniform, came on board; that he asked the pilot about the war; that the pilot told him it had been declared two days ago; that he asked the pilot where he could bring-to in safety, so that he might ascertain whether war was actually declared or not; that the pilot offered to take him to Flushing, or the Downs, or wherever he liked. The master elected to go to the Downs; and he anchored there on Sunday morning, the 17th, at 10 o'clock. He says, that on that day he could obtain no advice or information; that on the Monday, the 18th, he was on shore at Deal, and the German consul told him that war had broken out. He telegraphed to the owner, who was his father, and received an answer, forbidding him to go to Dunkirk; and on Tuesday the 19th he took the ship into Dover, as the nearest port.

On the same 19th of July, the French declaration of war was delivered to the Prussian Government at Berlin, which was known the same day by telegraph in England. On the 23d of July, an agent of the plaintiffs went to Dover, and required the master to proceed to Dunkirk, which he refused to do. Afterwards, on the 1st of August, the plaintiffs required the master to deliver them the cargo at Dover, which he refused to do unless he was paid his freight.

Under these circumstances, the plaintiffs allege that the master has committed two breaches of contract or duty: first in refusing to proceed to, and deliver the cargo at, Dunkirk; and secondly, they complain that, when the performance of the contract became impossible, and the contract was, as they allege, dissolved by the war, the master was not justified in refusing to deliver the cargo to the plaintiffs at Dover without payment of freight.

The first question to be considered is, whether the master was bound to have entered the port of Dunkirk on the 17th of July; and on that question, the learned Judge (Sir R. Phillimore) in the court below has found that on the 16th of July, the *Teutonia* could not have entered the port of Dunkirk with her cargo without being exposed to the penalties of trading with the enemy of her country; but that, if this was an erroneous application of the law to the facts at that date, the circumstances justified the master in pausing and making further inquiries as to the existing relations between his own country and France, and that he did not exceed the limits of a reasonable time in making the inquiry.

Their Lordships have great difficulty in agreeing with the learned Judge that the *Teutonia* could not have entered Dunkirk without being exposed to the penalties of trading with the enemy of its country on the 16th of July. There does not appear to their

Lordships to be any satisfactory evidence that a state of war existed between France and Prussia prior to the 19th of July.

Their Lordships do not think that either the declaration made by the French Minister to the French Chambers on the 16th of July, or the telegram sent by Count Bismarck to the Prussian Ambassador in London, in which he states that that declaration appears to be equal to a declaration of war, amounts to actual declaration of war. And though it is true, as stated by the learned Judge, that a war may exist *de facto* without a declaration of war, yet it appears to their Lordships that this can only be effected by an actual commencement of hostilities, which, in this case, is not alleged.

It is, however, unnecessary further to consider this part of the case, because their Lordships agree with the learned Judge that the master of the *Teutonia*, when he was informed, on his arrival off Dunkirk, by the pilot, although incorrectly, that war had been actually declared two days before, was entitled to pause and to take a reasonable time to make further inquiries, and that he did not exceed the limits of a reasonable time in making inquiries.

If the master had entered Dunkirk, and it had turned out that war had been previously declared, he would have entered it with notice that he was entering an enemy's port, and this would have obviously exposed his ship to condemnation, and might have exposed himself to severe penalties when he returned to his own country. It seems obvious that, if a master receives credible information that, if he continues in the direct course of his voyage, his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger. And their Lordships agree, if authority was wanting, that the case of *Pole* v. *Cetcovitch*, 9 C. B. (n. s.), 430, is an authority in point. It was argued, however, on the part of the appellants, that, to justify this course, both ship and cargo must be exposed to a common peril, whilst in the present case the cargo, being the property of a neutral owner, would have been in no danger from being carried into a French port, and it was argued that though a master might be justified in deviating from the direct course of the voyage for the purpose of avoiding a danger to which both ship and cargo were exposed, although it might afterwards turn out that the information upon which the master acted was incorrect, yet that if the reported danger was a danger to the ship alone, the master would commit a breach of contract by deviating from the direct course of the voyage unless the danger actually

existed, and the master could allege that he was prevented by one of the perils excepted in the bill of lading from pursuing his voyage in the direct course. It appears to their Lordships, however, that there is no sound ground for this distinction; if the cargo had been a Prussian cargo it would have been exposed to the same danger as the ship from entering the port at Dunkirk, and it appears to their Lordships that when an English merchant ships goods on board a foreign ship, he cannot expect that the master will act in any respect differently towards his cargo than he would towards a cargo shipped by one of his own country, and that it cannot be contended that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship, because from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship.

On the whole, therefore, their Lordships are of opinion, on this part of the case, that the master was justified in going to the Downs for the purpose of ascertaining whether war had actually been declared; and they also entirely agree with the opinion of the learned Judge, that the master was guilty of no unreasonable delay in not returning to Dunkirk before war was actually declared on the 19th of July.

[The Lords next consider "Whether the master was bound to deliver the cargo at Dover without any payment in respect of freight?"

The decision is made in accordance with English law, and, in substance, is as follows: While the breaking out of the war did render it illegal for the *Teutonia* to enter a French port, yet the contract, under the particular terms of the charter-party, could be legally performed by the delivery of the cargo at some of the other ports mentioned in the charter-party—that the contract was not dissolved by the impossibility of delivering the cargo at Dunkirk, and that the ship-owner had not lost his chartered freight nor his lien for it at the time when the cargo was demanded at Dover.][1]

[1] In the case of *The Panama*, decided at the same time as the *Buena Ventura*, 1898, 87 Fed. 927, 933, Locke, J., said: "*The Panama* sailed from New York before the 21st of April, 1898, and was upon the high seas at that time and at the time of capture. The fact that there had been no formal proclamation or declaration of war before she had sailed or at the time she was captured, or that she had at a recent date left a port of the United States, cannot be considered as exempting her from the liability of an enemy's property to capture, unless coming directly within the language of the President's proclamation. The practice of a formal proclamation before recognizing an existing war and capturing enemy's property has fallen into disuse in modern times, and actual hostilities may determine the date of the commencement of war, although no proclamation may have been issued, no declaration made or no action

THE PRIZE CASES.

Supreme Court of the United States, 1862.

(2 *Black*, 665.)

Mr. Justice Grier.[1] "There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

"They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the government, on the principles of international law, as known and acknowledged among civilized states?

"2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as 'enemies' property?'

"I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly

of the legislative department of the government had. This date has been declared by the act of Congress of April 25, 1898, and by the proclamation of the President of the next day to have been April 21, 1898, including that day, so that any Spanish property afloat, captured from that time, became liable to condemnation, unless exempt by the executive proclamation." [Articles 4 and 5.]

This case was affirmed on appeal, *The Panama*, 1899, 176 U. S. 535.

While formal declaration is clearly unnecessary to create war and the rights and obligations arising from such a status, it is of the gravest importance that it should be known as soon as possible to belligerents and neutrals alike. The parties to the war necessarily submit to its hardships and inevitable consequences with or without formal declaration, but inasmuch as war affects and seriously limits the rights and privileges of neutrals for the exclusive benefit of the belligerents: liability to confiscation for carrying contraband; inhibition to trade with blockaded ports; the subjection of neutral commerce on the high seas to visit and search, as will sufficiently appear later, it would be thoughtlessness or indifference amounting to bad faith if the belligerents failed to inform the neutrals of the existence of war.

As a matter of fact, "there have been only eleven formal declarations of war between civilized states since 1700, whereas the present century has seen over sixty words or acts of reprisal begun without formal notice to the power attacked." Lawrence's Int. Law, 300. See Hall's Int. Law, 391–399; Owen, Declaration of War, 1899.

No formal declaration of war by Congress, nor proclamation by the President is necessary to define and characterize an Indian war; it is sufficient if hostilities exist and military operations are carried on. *Alire's Case*, 1865, 1 Ct. Cl. 233, 238; *Marks* v. *U. S.*, 1893, 28 Ct. Cl. 147. — Ed.

[1] Statement of the facts is omitted. The second part of the opinion is given in § 32, *infra*. — Ed.

nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade *de facto* actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-chief of the Army and Navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the '*jus belli*,' and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us inquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other. Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war: They* claim to be in arms to establish their liberty and independence, in order to become a sovereign state, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil

war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels the opposite party will make reprisals, etc., etc.; the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine* against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know. The true test of its existence as found in the writing of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, *civil war exists* and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land."

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution.

The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not

initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral.' Lord Stowell (1 Dodson, 247) observes, "It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13th, 1846, which recognized "*a state of war as existing by the act of the Republic of Mexico.*" This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress. This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or state be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the *Santissima Trinidad* (7 Wheaton, 337), this Court say: "The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign right of war." (See also 3 Binn., 252.)

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the Government of the United States of America and *certain States* styling them-

selves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign state is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the Government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her Courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies*, because they are *traitors;* and a war levied on the Government by traitors, in order to dismember and destroy it, is not a *war*, because it is an "insurrection."

Whether the President in fulfilling his duties as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "*ex majore cautela*" and in anticipation of such astute objections, passing an act "approving, legalizing and making valid all the acts, proclamations and orders of the President, etc., as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States."

Without admitting that such an act was necessary under the

circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well-known principle of law, "*omnis ratihabitio retrotrahitur, et mandato equiparatur*," this ratification has operated to perfectly cure the defect. In the case of *Brown* v. *United States* (8 Cr., 131, 132, 133), Mr. Justice STORY treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice STORY dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is *ex post facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question, therefore, we are of opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.[1]

[1] In *Miller* v. *U. S.*, 1870, 11 Wall. 268, 307-8, Mr. Justice Strong said: "War existing, the United States were invested with belligerent rights in addition to the sovereign powers previously held. Congress had then full power to provide for the seizure and confiscation of any property which the enemy or adherents of the enemy could use for the purpose of maintaining the war against the government. It is true the war was not between two independent nations. But because a civil war, the government was not shorn of any of those rights that belong to belligerency. Mr. Wheaton, in his work on International Law (§ 296), asserts the doctrine to be that 'the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other and even as it respects neutral nations.' It would be absurd to hold that, while in a foreign war enemy's property may be captured and confiscated as a means of bringing the struggle to a successful completion, in a civil war of equal dimensions, requiring quite as urgently the employment of all means to weaken the belligerent in arms against the government, the right to confiscate the property that may strengthen such belligerent does not exist. There is no such distinction to be made. Every reason for the allowance of a right to confiscate in case of foreign wars exists in full force when the war is domestic or civil. In the *Amy Warwick*, 2 Sprague, 123, and in the *Prize Cases*, 2 Black, 673, it was decided that in the war of the rebellion the United States sustained the double character of a belligerent and a sovereign, and had the rights of both. *Rose* v. *Himely*, 4 Cranch, 272; *Cherriot* v. *Foussat*, 3 Binney, 252; *Dobree* v. *Napier*, 3 Scott, 225; *Santissima Trinidad*, 7 Wheaton, 306; *United States* v. *Palmer*, 3 Wheaton, 635." To the same effect,

CHAPTER II.

EFFECTS OF WAR AS BETWEEN ENEMIES.

Section 27. — Enemy's Property within the Territory and Debts due to the Enemy.

HAMILTON v. EATON.

Circuit Court of the Central States, N. Carolina District, 1796.

(2 *Martin's N. Carolina Reports*, 83.)

Ellsworth, C. J.[1] It is admitted that the bond on which this suit is brought, was executed by the defendant to the plaintiffs; and that the plaintiffs have not been paid. But the defendant pleads, that since the execution of the bond a war has existed, in which the plaintiffs

Tyler v. *Defrees*, 1870, 11 Wall. 331, 345, reiterating the doctrine and affirming the judgment of *Miller* v. *U. S.*

In *Stovall's Adm'r* v. *U. S.*, 1891, Ct. Cl. 226, 240, Chief Justice (then Justice) Nott, said: "It has been held in an unbroken series of decisions (from the *Prize Cases*, in 1 Black's Reports to *Young, Assignee of Collie*, in 97 U. S. Reports) that the civil war in all hostile operations must be regarded as international, and that 'all property within enemy's territory is in law enemy's property, just as all persons in the same territory are enemies.' Chief Justice Waite, 97 U. S. R. 60. When the United States accorded to the Confederate States the rights of a belligerent they became a hostile power and their inhabitants public enemies. The obligations of the Constitution do not extend across military lines nor into hostile territory. The law which governed the transactions of the civil war was not constitutional law, but international. It has been closely adhered to; so closely, that under the decisions of the court of last resort the loyal citizens of the North were practically excluded from the benefits of the Captured Property Act, and after non-intercourse began could do nothing to save their property in the South from Confederate confiscation; and though they acted in good faith, with no purpose to aid the rebellion, seeking simply to save their own property in the South by directing its investment there — sending nothing into the insurgent districts and bringing nothing out, but leaving the resources of the rebellion precisely as they found them — their acts were held to be intercourse between enemies, and the investments of their agents illegal and void. *Grossmayer's Case* (9 Wall. R. 72); *Dillon* (5 Ct. Cl.

[1] Statement of facts omitted and only the opinion of Chief Justice Ellsworth is given. — Ed.

were enemies; and that during the war this debt was confiscated and the money paid into the treasury of the State. And the plaintiffs reply, that by the treaty which terminated the war, it was stipulated, that "creditors on either side should meet with no lawful impediment, to the recovery of *bona fide* debts heretofore contracted."

Debts contracted to an alien are not extinguished by the intervention of war with his nation. His remedy is suspended while the war lasts, because it would be dangerous to admit him into the country, or to correspond with agents in it; and also because the transfer of treasure from the country to his nation, would diminish the ability of the former, and increase that of the latter, to prosecute the war. But with the termination of hostilities, these reasons and the suspension of the remedy cease.

As to the confiscation here alleged it is doubtless true, that enemy's property so far as consists in barring the creditor, and compelling payment from the debtors for the use of the public, can be confiscated; and that on principles of equity, though perhaps not of policy, they may be. For their confiscation as well as that of property of any kind, may serve as an indemnity for the expenses of war, and as a security against future aggression. That such confiscations have fallen into disuse, has resulted not from the duty which one nation, independent of treaties, owes to another, but from commercial policy, which European nations have found a common, and indeed a strong interest, in supporting. Civil war, which terminates in a severance of empire, does, perhaps, less than any other, justify the confiscation of debts; because of the special relation and confidence subsisting, at the time they were contracted, and it may have been owing to this confiscation as well as others, that the American States, in the late revolution, so generally forbore to confiscate the debts of British subjects. In Virginia, they were only sequestered; in South Carolina, all debts to whomsoever due were excepted from confiscation; as were in Georgia, those of "British

R. 586. Affirmed without opinion); *Cutner* (17 Wall. R. 617); *Lapene* (id. 601); *Montgomery* (16 id. 395); *Stoddard* (6 id. 340)."

Of the many State cases, *Hubbard* v. *Hornden Express Co.*, 1872, 10 R. I. 244, gives an exhaustive survey of relation of insurgent to legitimate government; *Smith* v. *Brazelton*, 1870, 1 Heisk. 44, summarizes the authorities in a singularly interesting and felicitous manner.

Article III., § 3 of the Constitution declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." For the judicial construction of this section and the terms employed in the definition, see *U. S.* v. *Greathouse and others*, 1863, 4 Sawy. 457. The same case is given in abbreviated form in McClain's excellent Cases on Constitutional Law, 541. — Ed.

merchants and others residing in Great Britain." And in the other States, except this, I do not recollect that British debts were touched. Certain it is, that the recommendation of Congress on the subject of confiscation did not extend to them. North Carolina, however, judging for herself, in a moment of severe pressure, exercised the sovereign power of passing an act of confiscation, which extended, amongst others, to the debts of the plaintiffs. Providing, however, at the same time, as to all debts which should be paid into the treasury, under that act, that the State would indemnify the debtors, should they be obliged to pay them.

Allowing, then, that the debt in question was in fact of right confiscated, can the plaintiffs recover by the treaty of 1783?

The fourth article of that treaty is in the following words: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all *bona fide* debts heretofore contracted."

There is no doubt the debt in question was a "*bona fide*" debt, and *theretofore* contracted, i. e., prior to the treaty. To bring it within the article, it is also requisite that the debtor and creditors should have been on different sides, with reference to the parties to the treaty, and as the defendant was confessedly a citizen of the United States, it must appear that the plaintiffs were subjects of the King of Great Britain; and it is pretty clear, from the pleadings and the laws of the State, that they were so. It is true that on the 4th of July, 1776, when North Carolina became an independent State, they were inhabitants thereof, though natives of Great Britain; and they might have been claimed and holden as citizens, whatever were their sentiments or inclinations. But the State afterwards, in 1777, liberally gave to them, with others similarly circumstanced, the option of taking the oath of allegiance, or of departing the State under a prohibition to return, with the indulgence of a time to sell their estates, and to collect and remove their effects. They chose the latter; and ever after adhered to the King of Great Britain, and must therefore be regarded as on the British side.

It is also pertinent to the inquiry, whether the debt in question be within the before-recited article, to notice an object which has been stated by the defendant's counsel, viz., that at the date of the treaty, what is now sued for as a debt, was not a *debt*, but a nonentity; payment having been made, and a discharge effected, under the act of confiscation; and therefore that the stipulation concerning *debts* did not reach it.

In the first place, it is not true that in this case there was no debt at the date of the treaty. A debt is created by contract, and exists till

the contract is performed. Legislative interference, to exonerate a debtor from the performance of his contract, whether upon or without conditions, or to take from the creditor the protection of law, does not in strictness destroy the debt, though it may, locally, the remedy for it. The debt remains, and in a foreign country payment is frequently enforced.

Secondly, it was manifestly the design of the stipulation, that where debts had been *therefore contracted*, there should be no bar to their recovery, from the operation of laws passed subsequent to the contracts. And to adopt a narrower construction, would be to leave creditors to a harder fate than they have been left to, by any modern treaty.

Upon a view, then, of all the circumstances of this case, it must be considered as one within the stipulation, that there should be "no lawful impediment to a recovery." And it is not to be doubted, that impediments created by the act of confiscation, are *lawful* impediments. They must therefore be disregarded, if the treaty is a rule of decision. Whether it is so or not, remains to be considered.

Here it is contended by the defendant's counsel, that the confiscation act has not been repealed by the State; that the treaty could not repeal or annul it; and therefore that it remains in force, and secures the defendant. And further, that a repeal of it would not take from him a right vested, to stand discharged.

As to the opinion, that a treaty does not annul a statute, so far as there is an interference, it is unsound. A statute is a declaration of the public will, and of high authority; but it is controllable by the public will and subsequently declared. Hence the maxim, that when two statutes are opposed to each other, the latter abrogates the former. Nor is it material, as to the effect of the public will, what organ it is declared by, provided it be an organ constitutionally authorized to make the declaration. A treaty when it is in fact made, is, with regard to each nation that is a party to it, a national act, an expression of the national will, as much as a statute can be. And it does, therefore, of necessity, annul any prior statute, so far as there is an interference. The supposition that the public can have two wills at the same time, repugnant to each other, one expressed by a statute, and another by a treaty, is absurd.

The treaty now under consideration was made, on the part of the United States, by a Congress composed of deputies from each State, to whom were delegated by the articles of confederation, expressly, "the sole and exclusive right and power of entering into treaties and alliances;" and being ratified and made by them, it became a complete national act, and the act and law of every State.

If, however, a subsequent sanction of this State was at all necessary to make the treaty law here, it has been had and repeated. By a statute passed in 1787, the treaty was declared to be law in this State, and the courts of law and equity were enjoined to govern their decisions accordingly. And in 1789, was adopted here the present Constitution of the United States, which declared, that all treaties made, or which should be made, under the authority of the United States, should be the supreme law of the land; and that the judges in every State should be bound thereby; any act in the constitution or laws of any State to the contrary notwithstanding. Surely, then, the treaty is now law in this State, and the confiscation act, so far as the treaty interferes with it, is annulled.

Still it is urged, that annulling the confiscation act cannot annul the defendant's right of discharge, acquired while the act was in force.

It is true, that the repeal of a law does not make void what has been well done under it. But it is also true, admitting the right here claimed by the defendant, to be as substantial as a right of property can be, that he may be deprived of it, if the treaty so requires. It is justifiable and frequent, in the adjustment of national differences, to concede for the safety of the State, the rights of individuals. And they are afterwards indemnified or not, according to circumstances. What is most material to be here noted is, that the right or obstacle in question, whatever it may amount to, has been created by law, and not by the creditors. It comes within the description of "lawful impediments; all of which, in this case, the treaty, as I apprehend, removes.

Let judgment be for the plaintiffs.[1]

[1] A much more cited case is *Ware* v. *Hylton*, 1796, 3 Dall. 199, from which the most important parts of the judgments and opinions of the Justices are given:

Chase, J. — "The defendant in error, on the . . . day of July, 1774, passed their penal bond to Farrell and Jones for the payment of £2,976 11*s.* 6*d.*, of good British money. In 1777, the war of the revolution having broken out, the Legislature of Virginia passed a law to sequester British property; the 3d section of which was as follows:

"'That it should be lawful for any citizen of Virginia, owing money to a subject of Great Britain, to pay the same, or any part thereof, etc., . . . into the loan-office, taking thereout a certificate for the same, in the name of the creditor, with the indorsement, under the hand of the commissioner of said office, expressing the name of the payer.' The governor and council were to see to the safekeeping of such sums, subject to the future directions of the Legislature. In 1780 the defendants (in error) paid into the loan-office a part of their debt, in accordance with stipulations of the above law. After the return of peace, they were sued in the above bond in the circuit court of Virginia; and pleaded the said law of the Legislature of Virginia, and the payment thereunder, in bar of so much of the plaintiff's debt. The plaintiff, to avoid this

BROWN v. THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES, 1814.

(8 *Cranch*, 110.)

The *Emulous*, owned by John Delano and others, citizens of the United States, was chartered to a company carrying on trade in Great Britain, one of whom was an American citizen, for the purpose of carrying a cargo from Savannah to Plymouth (England). After

bar, replied the fourth article of the treaty of peace between Great Britain and the United States, of 1783. For this replication there was a general demurrer and rejoinder. The circuit court allowed the demurrer, and the plaintiff brought the present writ of error.

"The counsel for the plaintiff denied that the Virginia Legislature was competent to pass such a law; first, because it was contrary to the law of nations, relying on Vattel (lib. 3, c. 5, sec. 77); and, secondly, that the Legislature was not competent, inasmuch as all such power belonged exclusively to Congress. But it was held by the court that at the time of passing the law, Virginia was a free and independent State, inasmuch as Congress as well as the several individual States had declared their independence; and the articles of confederation had not yet been ratified. Supposing a general right to confiscate British property is admitted to be in Congress, then the same right belonged to the Legislature of Virginia at the time of passing the act. The legislative power of every nation can only be restrained by its own constitution; and it is the duty of its courts of justice not to question the validity of any law made in pursuance of the constitution. In this case the law is obligatory on the courts of Virginia, and in my opinion on the courts of the United States. If Virginia, as a sovereign State, violated the ancient or modern law of nations, in making the law of the 20th October, 1777, she was answerable in her political capacity to the British nation, whose subjects have been injured in consequence of that law.

"It appears to me that every nation at war with another is justified, by the general and strict law of nations, to seize and confiscate all movable property of its enemy (of any kind or nature whatever) wherever found, whether within its territory or not." (Bynkershoek, Q. J. P. de rebus bellices, lib. 1, c. 7, 175, 177; Vattel, B. 4, sec. 221; Sir Thomas Parker's Rep. 267.)

"The right to confiscate the property of enemies during war is derived from a state of war; and is called the rights of war. This right originates from self-preservation, and is adopted as one of the means to weaken an enemy, and to strengthen ourselves. Justice, also, is another pillar on which it may rest; to wit, a right to reimburse the expense of an unjust war. Vattel. lib. 3, c. 8, sec. 138; and c. 9, sec. 161.

"Vattel is the only author relied on (or that can be found) to maintain the distinction between confiscating private debts, and other property of an enemy. Mr. Lee says, 'By the law of nations, rights and credits are not less in our power than other goods; why, therefore, should we regard the rights of war in regard to one, and not as to the others? And when nothing occurs which gives room for a proper distinction, the general law of nations ought to prevail.' He gives many examples of confis-

the cargo was put on board, the vessel was stopped in port by the embargo of the 4th of April, 1812. On the 25th of the same month,

cating debts, and concludes (p 119), 'All which prove, that not only actions, but all other things whatever, are forfeited in time of war.' Lee on Capture, c. 8, p. 118. * * *

"If a nation, during war, conducts herself contrary to the law of nations, and no notice is taken of such conduct in the treaty of peace, it is thereby so far considered lawful, as never afterwards to be revived, or to be a subject of complaint. * * *

"The validity of such a law (the act of the Virginia Legislature) would not be questioned in the Court of Chancery of Great Britain; and the doctrine seemed strange to me in an American court of justice." See Lord Chancellor Thurlow in *Wright* v. *Nutt*, 1782, II. Black. Rep. p. 135, 149; 3 Term. Rep. 726.

The other justices expressed their individual opinions in the case. Patterson, J., admitted, that in strict law, debts might be confiscated, but spoke strongly against the policy of doing so.

Wilson, J., thought the confiscation of debts disreputable.

Cushing, J., admitted the right to confiscate debts, but thought the fourth article of the treaty annulled the statute of Virginia; and further that the State ought to be responsible to the debtor for the amount paid into the loan-office.

The sixth article of the present Constitution of the United States, "That all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution, or laws, of any State to the contrary notwithstanding," was held to have a retroactive effect, and to be considered in the same light as if the Constitution had been established before the making of the treaty of 1783; and that Congress was competent to make the fourth article of the said treaty, which is to the following effect: "It is agreed that creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts, heretofore contracted." And, further, the said fourth article of the treaty annulled the act of confiscation of the Legislature of Virginia, and the payment under it. And on that ground the judgment of the circuit court was reversed; and judgment on the demurrer for plaintiff in error, with costs in the circuit court and the costs of the appeal.

The case above referred to as reported in Parker (11 William III.) is *Attorney-General* v. *Weeden and Shales*. This was the case of a naturalized Frenchman who died during the war, leaving in his will several legacies to Frenchmen living in Bordeaux. A commission was issued to investigate the matter; but peace was made meantime, ten days before the inquisition was found and returned. And after long debate it was resolved: "First, that choses in action which belonged to an alien enemy were forfeitable to the Crown.

"Secondly, that this ought to be found by inquisition to make a title to the King and that this was an inquisition of entitling, and not of instruction. *Page's Case*, 5 Co. 52.

"Thirdly, that the peace, being concluded before the inquisition was taken, discharged the cause of forfeiture.

"Fourthly, that the inquisition taken afterwards did not relate to set up this forfeiture, for the cause was but temporary; and that cause being removed before the King's title was found, the finding after should not relate."

See, also, *Folliott* v. *Ogden*, 1789, 1 H. Black. 123, in which it was held *inter alia* that the State of New York, during the American Revolution possessed the right inherent in a sovereign nation to confiscate the debts and private property belonging to the enemy (loyalists). But see same case on error in K. B., 1790, 3 Term R. 725, where

it was agreed between the master of the ship and the agent of the shippers, that she should proceed with her cargo to New Bedford, where her owners resided. While the ship was lying at New Bedford, war was declared (18th of June); and in October or November the cargo, consisting of pine timber, staves, and laths, was unloaded, the timber being put in a salt-water creek — not navigable, and on the 7th November was sold by the agent of the owners, an American citizen, to the claimant, Armitz Brown, who was also an American citizen. On the 19th April, 1813, a libel was filed by the attorney for the United States in the District Court of Massachusetts against the said cargo, as well on behalf of the United States as for and in behalf of John Delano, and for all others concerned. The attorney had no instructions from his superior, the President of the United States, but acted at the instance of Delano, the owner of the *Emulous*.

The District Court dismissed the libel. The Circuit Court (Story, Justice), reversed this sentence, and condemned the pine timber as enemy's property forfeited to the United States. The claimant appealed to the Supreme Court.[1]

Marshall, C. J., delivered the opinion of the court: —

The material question made at bar is this: can the pine timber, even admitting the property not to be changed by the sale in November, be condemned as prize of war? The cargo of the *Emulous* having been legally acquired and put on board the vessel, having been detained by an embargo not intended to act on foreign property, the vessel having sailed before the war, from Savannah, under a stipulation to reland the cargo in some port of the United States, the re-landing having been made with respect to the residue of the cargo, and the pine timber having been floated into shallow water, where it was secured and in the custody of the owner of the ship, an American citizen, the Court cannot perceive any solid distinction, so far as respects confiscation, between this property and other British property found on land at the commencement of hostilities.

it was distinctly held by Lord Kenyon, C. J., that acts of confiscation passed in the several States of North America after the Declaration of Independence, 1776, and before the treaty of peace, 1783, by which Great Britain acknowledged their independence, are considered as a nullity in British courts of justice. See, however, the comment on this case by Loughborough (as Lord Chancellor) in *Barclay* v. *Russell*, 1797, 3 Ves. Jr. 423, 428. This latter case, dealing with the claim of Maryland to succeed to assets of the proprietary government, should be considered in connection with the effect of change of sovereignty. — Ed.

[1] The statement of the case is abridged and part of the opinion of the learned chief justice has been omitted. — Ed.

It will therefore be considered as a question relating to such property generally, and to be governed by the same rule.

Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court.

The questions to be decided by the court are:

1st. May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war?

2d. Is there any legislative act which authorizes such seizure and condemnation?

Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask:

Is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government, as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign power?

The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation.

Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction; and, although, in practice, vessels with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the right of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The inquiry is whether

such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will: and the rule which applies to one case so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of a sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and on other property found in the country must be the same. What, then, is this operation?

Even Bynkershoek, who maintains the broad principle, that in war everything done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud or even poison, may be employed against him; that a most unlimited right is acquired to his person and property; admits that war does not transfer to the sovereign a debt due to his enemy; and, therefore, if payment of such debt be not exacted, peace revives the former right of the creditor; "because," he says, "the occupation which is had by war consists more in fact than in law." He adds to his observations on this subject, "let it not, however, be supposed that it is only true of actions, that they are not condemned *ipso jure*, for other things also belonging to the enemy, may be conceded and escape condemnation."

Vattel says, that "the sovereign can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration."

It is true that this rule is, in terms, applied by Vattel to the property of those only who are personally within the territory at the commencement of hostilities; but it applies equally to things in action and to things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest the property of the enemy in the sovereign, his presence would not exempt it from this operation of war. Nor can a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others.

Chitty, after stating the general right of seizure, says, "but, in strict justice, that right can take effect only on those possessions of a belligerent which have come to the hands of his adversary after the declaration of hostilities." (P. 67.)

The modern rule, then, would seem to be, that tangible property belonging to an enemy and found in the country at the commence-

ment of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property.

"This rule seems to be totally incompatible with the idea that war does of itself vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to the exercise of this right.

"The Constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that Constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the Government to apply to the enemy the rule that he applies to us.

"If we look to the Constitution itself, we find this general reasoning much strengthened by the words of that instrument.

"That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers which accompanies that of declaring war. 'Congress shall have power'—'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.'

"It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water is to be confined to captures which are exterritorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress of the power in question as an independent substantive power, not included in that of declaring war.

"The acts of Congress furnish many instances of an opinion that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found, at the time, within the territory.

"War gives an equal right over persons and property; and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers

on the President very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war.

"The 'act for the safe-keeping and accommodation of prisoners of war,' is of the same character.

"The act prohibiting trade with the enemy contains this clause:

"'And be it further enacted, that the President of the United States be and he is hereby authorized to give, at any time within six months after the passage of this act, passports for the safe transportation of any ship or other property belonging to British subjects, and which is now within the limits of the United States.'

"The phraseology of this law shows that the property of a British subject was not considered by the legislature as being vested in the United States by the declaration of war; and the authority which the act confers on the President is manifestly considered as one which he did not previously possess.

"The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt. Is there in the act of Congress, by which war is declared against Great Britain, any expression which would indicate such an intention?

"That act, after placing the two nations in a state of war, authorizes the President of the United States to use the whole land and naval force of the United States to carry the war into effect, and 'to issue to private armed vessels of the United States commissions or letters of marque and general reprisal against the vessels, goods and effects of the government of the United Kingdom of Great Britain and Ireland, and the subjects thereof.'

"That reprisals may be made on enemy property found within the United States at the declaration of war, if such be the will of the nation, has been admitted; but it is not admitted that, in the declaration of war, the nation has expressed its will to that effect.

"It cannot be necessary to employ argument in showing that when the attorney for the United States institutes proceedings at law for the confiscation of enemy property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisal, still less under the authority of such letters issued to a private armed vessel.

"The 'act concerning letters of marque, prizes and prize goods,' certainly contains nothing to authorize this seizure.

"There being no other act of Congress which bears upon the subject, it is considered as proved that the legislature has not confiscated enemy property which was within the United States at the decla-

ration of war, and that this sentence of condemnation cannot be sustained.

"One view, however, has been taken of this subject which deserves to be further considered.

"It is urged that, in executing the laws of war, the executive may seize and the courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated.

"This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

"The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.

"Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.

"It appears to the court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war. The court is therefore of opinion that there is error in the sentence of condemnation pronounced in the Circuit Court in this case, and doth direct that the same be reversed and annulled, and that the sentence of the District Court be affirmed." [1]

[1] Mr. Justice STORY, with a minority of the court, held that, the right of confiscation existing, it was within the power of the executive to enforce confiscation, in the same manner that the executive established blockades and authorized the capture of the enemy's property at sea, and contraband goods.

Dr. Wharton, in his Commentaries on American Law (§ 216, pp. 307–309), collects

Ex Parte BOUSSMAKER.

CHANCERY, 1806.

(13 *Vesey Jun.* 71.)

This was a petition to be admitted to prove a debt under a commission of bankruptcy; which the commissioners refused to admit, upon the objection that the creditors applying to prove were alien enemies.

the authorities and states the following as the result of his study and investigation: "It has been held that the act of Congress declaring war against Great Britain did not work such confiscation. *The Juniata*, Newberry, 352. In *Brown* v. *U. S. ut sup.*, the right to confiscate debt was asserted; and *Ware* v. *Hylton*, 3 Dall. 199, was relied on as authority. But the better view is that the property of the inhabitants of an invaded country should not be taken by an invading army without remuneration. *U. S.* v. *Sterenson*, 3 Benedict, 119; Bluntschli, § 657. In the United States Articles of War, 1863, § 2, art. 37, it is said: 'The United States acknowledge and protect, in hostile countries occupied by them, religion and morality, strictly private property, the persons of the inhabitants, especially those of women, and the sacredness of the domestic relations. Offences to the contrary shall be rigorously punished.' To the effect that private property cannot be seized by an invading army, unless contraband, see Kent's Com., i. 93 *et seq.*; *U. S.* v. *Homeyer*, 2 Bond, 217; Transactions of the National Association for the Promotion of Social Science, 1860, pp. 163, 279; id., 1861, pp. 126, 748, 794; id., 1862, pp. 89, 896, 899; id., 1863, pp. 851, 878, 884; id., 1864, pp. 596, 656; id., 1868, pp. 168–187; Hautefeuille, Droits et Devoirs, i., 340–44; Martens, Essai sur les Armateurs, s. 45; and other authorities given in Field, *ut sup.* Heffter (Volkerrecht, s. 130, 132, 139, 140, 175, 192) holds that war gives only actual possession, but not the legal property in such captures.

"Dr. Woolsey (Int. Law, § 118, *note*) after noticing Hamilton's argument against confiscation (Hamilton's Works, Vol. VII., 19th letter of 'Camillus'), adds, speaking of the confiscation of the private property of the subject of the enemy, 'The foreigner brought his property here, it can at once be said, knowing the risk he might run in the event of a war. Why should he not incur the risk? He should incur it, say the older practice and the older authorities. He should not, says the modern practice, although international law in its rigor involves him in it. He should not, according to the true principle of justice, because his relation to the state at war is not the same with the relation of his sovereign or government; because, in short, he is not in the full sense an enemy.' To this it may be added that when a foreigner invests property in a country with the permission of its government, there is an implied understanding that his title thereto will be respected unless divested by his personal act.

"As sustaining the right of seizure of private property in an enemy's country, see *The Venus*, 8 Cranch, 253; *The Ann Green*, 1 Gall. 274; *The Lilla*, 2 Sprague, 177; *The Freundschaft*, 3 Wheat. 15, 4 Wheat. 105. That this does not impress with belligerency a neutral on motion to leave *bona fide* belligerent territory, see *The Venus*, *ut supra*; *The St. Lawrence*, 1 Gall. 467. That neutrals and citizens are to be allowed

The Lord Chancellor, ERSKINE, said: "If this had been a debt arising from a contract with an alien enemy, it could not possibly stand; for the contract would be void. But, if the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue; but the contract being originally good, upon the return of peace the right would revive. It would be contrary to justice, therefore, to confiscate this dividend. Though the right to recover is suspended, that is no reason why the fund should be divided among the other creditors. The point is of great moment, from the analogy to the case of an action; and it is true, a court of law would not take notice of the objection without a plea. It must appear upon the record. * * * The policy, avoiding contracts with an enemy is sound and wise; but when the contract was originally good, and the remedy is only suspended, the proposition, that therefore the fund should be lost, is very different.

"Let the claim be entered; and the dividend reserved."

a reasonable time, after breaking out of war, to withdraw from a belligerent country, see *The Sarah Starr*, Blatch. Pr. Ca. 650; *The General Pinckney*, ibid. 668.

"In *Mitchell* v. *Harmony* (13 Howard, 115), it was held that private property could only be taken by a military commander in case of necessity, for public use, to prevent it being used as contraband of war or falling into the enemy's hands. This, in the late civil war, was held to be the case with cotton, which, as one of the chief military supports of the Confederacy, was regarded as contraband. *Alexander's Cotton*, 2 Wall. 404. In this case, Chief Justice Chase, giving the opinion, declared that the right of capture 'may now be regarded as substantially restricted to 'special cases' (citing Chancellor Kent), 'dictated by the necessary operation of war;' and as excluding, in general, 'the seizure of the private property of pacific persons for the sake of gain.' In *U. S.* v. *Klein*, 13 Wall. 128, he says: 'No titles were divested in the insurgent States, unless in pursuance of a judgment rendered after due legal proceedings. The Government recognized, to the fullest extent, the humane maxims of the modern law of nations, which exempt property of non-combatant enemies from capture or booty of war.' To the same effect see *Lamar* v. *Brown*, 92 U. S. 194.

"'In respect to real property the acquisition by the conqueror is not fully consummated until confirmed by a treaty of peace, or by the entire submission of or destruction of the State to which it belonged.' Clifford, J., *U. S.* v. *Huckabee*, 16 Wall. 434."

For a very recent formulation of the right of confiscation of private property of enemies in war, see Magoon's Military Occupation, 264–281. — ED.

WOLFF v. OXHOLM.

KING'S BENCH, 1817.

(6 *Maule and Selwyn*, 92.)

Oxholm, a Danish subject, was indebted, February 7, 1800, to the firm of Wolff & Dorville, English subjects, in the sum of £2,101 7*s.* 5*d.* sterling money, for which a suit was instituted in the Danish courts by Wolff & Dorville through their proctor, resident in Denmark. The defendant set up certain counter-claims in defense. To avoid this, the plaintiffs in 1806 assigned the debt to a Danish subject, who should sue and recover in his own name, thus avoiding some technicality in the Danish laws which affected the case.

The defendant, in Sept., 1806, instituted a cross-suit. In 1807, whilst these suits were pending, a war broke out between Great Britain and Denmark; and an ordinance was made by the government of Denmark, August 16, 1807, by which all ships, goods, money, and money's worth, of or belonging to English subjects, were declared to be sequestrated and detained; and by another law or ordinance of the Danish government, dated Sept. 9, 1807, all persons were commanded with in three days after the publication thereof (wherever it was not then already done) to transmit an account of the debts due to English subjects, of whatsoever nature or quality they might be, the whole of which were directed to be paid into the Danish treasury, and in case of concealment the person so offending was to be proceeded against by the officers of the exchequer. In virtue of this law and ordinance, commissioners were appointed to receive the debts declared to be sequestrated: and as a consequence of the ordinance, the suit of Mountford (the assignee of Wolff & Co.) against the defendant was not further prosecuted, and in 1807, the proctor gave information to the commissioners of the debt. The commissioners authorized such payments at the then current rate of exchange, six Danish dollars to the pound sterling.

In 1812 the defendant paid to the commissioners the amount of the debt with the accrued interest, and took their receipt for the same; upon the production of which, the court quashed the cause depending between Mountford and the defendant. It is said the rate of exchange at the time of payment, was forty-five to fifty dollars to the pound sterling. In 1814, the defendant arrived in this country and was arrested, and held to bail by the plaintiffs for the debt.

Lord ELLENBOROUGH, C. J. [after an elaborate examination of the older authorities, Grotius, Puffendorf, Vattel and others], delivered the opinion of the court.

It was admitted that, notwithstanding all the violent measures to which recourse has been had during the extraordinary warfare, that we have witnessed in our own times, this ordinance of the court of Denmark stands single and alone, not supported by any precedent, nor adopted as an example in any other state. The ordinance itself, however, so far as we can learn from this case, was not followed up by any practical measure of compulsion on the subjects of Denmark. Nothing in the nature of the process against the defendant to enforce the payment of this particular debt, nothing analogous to the seizure or condemnation of corporeal things taken in the time of war occurred on this occasion; and although the commissioners appointed under the ordinance to receive the sequestered moneys were informed of this debt as early as the year 1807, yet the defendant did not pay the money until 1812. An allusion was made in the course of the argument to a statute in our own country, the 34 G. 3, c. 79. This, however, was not an act of confiscation to the benefit of the state, but a measure of policy not less generous than lawful, by which at the same time that the transmission of money to the enemies of the state was prevented, the money itself was called in, secured, and kept for those to whom it was due, until the return of peace should enable them to receive it. Considering, therefore, that the right of confiscating debts contended for on the authority of these citations from Vattel is not recognized by Grotius, and is impugned by Puffendorf and others, that such confiscation was not general at any period of time, and that no instance of it, except the ordinance in question, is to be found for something more than a century, we think our judgment would be pregnant of mischief to future times, if we did not declare, that in our opinion, this ordinance, and the payment to the commissioners appointed under it, do not furnish a defence to the present action; and if they cannot do this of themselves, neither can they do so by the aid of the proceedings in the Danish court. The parties went into that court expecting justice, according to the then existing laws of the country, and are not bound by the quashing of their suit, in consequence of a *subsequent ordinance, not conformable to the usage of* nations, and which, therefore, they could not expect, nor are they or we bound to regard.

Postea to the plaintiffs.[1]

[1] This decision is directly at variance with the American cases above quoted. Sir Robert Phillimore (International Law, III., 723) in reviewing this judgment, shows that the inferences from the language of Vattel, Grotius, and Puffendorf were not war-

Section 28. — Private Contracts.

HOARE v. ALLEN.

Supreme Court of Pennsylvania, 1789.

(2 *Dallas*, 102.)

This was a *scire facias* on a mortgage given on the 4th December, 1773, for securing the payment of £16,000 sterling, with interest. It was tried at Chester, *Nisi Prius*, on the 4th May, 1789, before the Chief Justice [McKean], Atlee and Bryan, justices; when it ap-

ranted; while the authority of Bynkershoek and the Dutch tribunals was hardly touched upon. That, moreover, to the high authority of Story and the American tribunals no allusion appears to have been made by counsel or judge. "Perhaps," he continues, "if the occasion should present itself, the decision of Lord Ellenborough might be reversed in England. It was the decision of a single court not much accustomed to deal with questions of international law."

The provocation for the act of the Danish Government was very great. An English squadron had taken violent possession of the Danish fleet in time of peace between the two countries (1807); and at the breaking out of war in consequence of this act the English government had confiscated all the Danish ships found in English ports as *droits* of admiralty.

In the case of the *Johanna Emilie*, Spinks' Prize Cases, 14 (1854), Dr. Lushington said. "If the property was on land, according to the ancient law, it was also seizable; and certainly during the American war there were not wanting instances in which such property was seized and condemned by law — not by the authority of this court, but of another. That rigor was afterwards relaxed. I believe no such instance has occurred from the time of the American war to the present day — no instance in which property inland was subject to search or seizure, but no doubt it would be competent to the authority of the Crown if it thought fit."

During the civil war in the United States (1861), the Congress of the Confederate States confiscated by act of Congress all property, movable or immovable, and all rights, credits, and interests held within the Confederacy by or for any alien enemy, except public stocks and securities. And all persons domiciled within the enemy's country were held to be subject to the provisions of the act. Act of August 6th, 1861. McPherson, History of the Rebellion, 203.

It would seem to be clear that, by the strict law, tangible property and debts are still subject to confiscation by a belligerent. But it is equally clear that the entire drift of modern opinion and practice is opposed to the exercise of that right. In the case of *Hanger* v. *Abbott*, 1867, 16 Wall. 532, the Supreme Court of the United States said: "In strictness it (the right of confiscating such debts) may still be said to exist, but it may well be considered as a naked and impolitic right, condemned by the enlightened conscience of modern times."

On the other hand, property of the enemy found afloat in ports at the outbreak of war, as ships with their cargoes, has generally, in the absence of a contrary agreement,

peared that the plaintiff was a British subject, resident in London; that Amos Strettle was his attorney in fact, at the time of the execution of the mortgage and after; but it did not appear, whether he continued to act as such subsequent to the war. He resided in the State till his death, which was about * * * The question that was made in this cause was, whether interest should run during the war?

By the Court: — This action is brought on a mortgage for £16,000, payable on 4th December, 1774. No suit could be brought on the mortgage before the 4th December, 1775. Before that period the war commenced, and on the 10th September, 1775, the Congress prohibited the exportation of commodities, etc., to Great Britain, or any of her dominions. This was obligatory on their constituents, and it became unlawful to make any remittances after this to the enemy. During a war all civil actions between enemies are suspended; debts are suspended also, but restored by the peace. For the term of seven and a half years, viz., from the 10th September, 1775, to the 10th March, 1783, the defendant could not have paid this money to the plaintiff, who was an alien enemy, without a violation of the positive laws of this country, and of the laws of nations. They ought not, therefore, to suffer for their moral conduct, and their submission to the laws.

Interest is paid for the use or forbearance of money. But in the case before us, there could be no forbearance; because the plaintiff could not enforce the payment of the principal; nor could the defendants pay him, consistent with law; nor could they pay it without going into the enemy's country, where the plaintiff was. Where a person is prevented, by law, from paying the principal, he shall not be compelled to pay interest during the prohibition, as in the case of a garnishee, in a foreign attachment.

It is urged, that a remittance in bills of exchange furnished the enemy with no money. Yet, it is clear that it would furnish the enemy with the means of carrying on the war, within the bowels of the country, without bringing any money into it. It is well known that the bills drawn by the British army were the principal bills that were bought and sold; those drawn by American citizens were generally protested.

It has been said that it might have been paid to Strettle; but that

been confiscated, following the rules still in practice in respect of private property of the enemy at sea. In *Brown* v. *The United States*, *supra*, the Supreme Court was careful to exclude from the rule of the decision property found afloat in ports. But here, too, there are strong indications of a milder rule, if indeed it is not already firmly established. The most recent practice of the United States appears in the President's Proclamation of April 26, 1898; its official construction and judicial interpretation in the case of the *Buena Ventura*, 1899, 175 U. S. 384. — Ed.

depended upon his pleasure, whether he chose to act as attorney or not.

I have searched for precedents both in the civil law, and in the books of reports; but could find none. We, therefore, determine on principle and analogy, and are unanimously of opinion, that the plaintiff is not entitled to interest from the 10th September, 1775, to 10th March, 1783; but during the rest of the time he must be allowed full interest.

The jury adopted the principles of the charge; but struck off seven and a half years' interest.[1]

HANGER v. ABBOTT.

Supreme Court of the United States, 1867.

(6 *Wallace*, 532.)

Error to the Circuit Court for the Eastern District of Arkansas.

J. & E. Abbott, of New Hampshire, sued Hanger, of Arkansas, in assumpsit. The latter pleaded the statute of limitations of Arkansas, which limits such action to three years. The former replied the rebellion, which broke out after the cause of action accrued, and closed for more than three years all lawful courts. On demurrer, and judgment against it, and error to this court, the question here was, simply, whether the time during which the courts in Arkansas were closed on account of the rebellion, was to be excluded from the computation of time fixed by the Arkansas statute of limitations within which suits on contracts were to be brought, there being no exception by the terms of the statute itself for any such case.[1]

Mr. Justice Clifford delivered the opinion of the court: —

"Proclamation of blockade was made by the President on the

[1] In the interesting case of *Foxcroft & Galloway* v. *Nagle*, 1791, 2 Dall. 132, it appeared that Galloway was with the enemy (British army) while they were in Philadelphia and that Nagle, the defendant, then lived within three miles of the city and might, therefore, have gone in and come out at pleasure (had such not been expressly forbidden by statute). On these facts and allegations it was held: "By the court: It has been frequently settled, that the debt being suspended during the war, no interest could arise upon it If the plaintiffs mean to make it a point, they will have an opportunity to do so, at the return of the *postea*. We are all of opinion, however, that the interest during the war should be deducted; that is, for seven and a half years. Verdict accordingly." See, also, *Thomas* v. *Hunter*, 1868, 29 Md. 406; *Roberts* v. *Cocke*, 1877, 28 Gratt. 207; *McVeigh* v. *Bk. of Old Dominion*, 1875, 26 Gratt. 188. — Ed.

[1] Only selected extracts are given from the opinion of the learned justice. — Ed.

nineteenth day of April, 1861, and, on the thirteenth day of July, in the same year, Congress passed a law authorizing the President to interdict all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States. 12 Stat. at Large.

"War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy's country. Upon this principle of public law it is the established rule in all commercial nations, that trading with the enemy, except under a government license, subjects the property to confiscation, or to capture and condemnation.

"Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in that case an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, which necessarily dissolves the relation, independent of the will or acts of the parties. Direct consequence of the rule as established in those cases is, that as soon as war is commenced all trading, negotiation, communication, and intercourse between the citizens of one of the belligerents with those of the other, without the permission of the government, is unlawful. No valid contract, therefore, can be made, nor can any promise arise by implication of law, from any transaction with an enemy. Exceptions to the rule are not admitted; and even after the war has terminated, the defendant, in an action founded upon a contract made in violation of that prohibition, may set up the illegality of the transaction as a defence. * * *

"Executory contracts also with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates for that purpose with a force equivalent to an act of Congress. *Exposito* v. *Bowden*, 4 Ellis & Blackburne, 963; same case, 7 id. 778.

"In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times. Better opinion is that executed contracts, such as the debt in this case, although existing prior to the war, are not annulled or extinguished, but the remedy is only suspended, which is a necessary conclusion, on account of the inability of an alien enemy to sue or to sustain, in the language of the civilians, *a persona standi in judicio*. *Flint* v. *Waters*, 15 East. 260.

"Trading, which supposes the making of contracts, and which also involves the necessity of intercourse and correspondence, is necessarily contradictory to a state of war, but there is no exigency in war which requires that belligerents should confiscate or annul the debts due by the citizens of the other contending party. * * *

"Under the thirty-fourth section of the Judiciary Act, the statutes of limitations of the several States, where no special provision has been made by Congress, form the rule of decision in the courts of the United States, and the same effect is given to them as is given in the courts of the State. * * *

"When our ancestors immigrated here, they brought with them the statute of 21 Jac. 1, c. 16, entitled 'An act for limitation of actions, and for avoiding of suits in law,' known as the statute of limitations. * * *

"Persons within the age of twenty-one years, *femes covert*, *non compos mentis*, persons imprisoned or beyond the seas, were excepted out of the operation of the third section of the act, and were allowed the same period of time after such disability was removed. Just exceptions indeed are to be found in all such statutes, but when examined it will appear that they were framed to prevent injustice and never to encourage laches or to promote negligence. Cases where the courts of justice are closed in consequence of insurrection or rebellion are not within the express terms of any such exception, but the statute of limitations was passed in 1623, more than a century before it came to be understood that debts due to alien enemies were not subject to confiscation. Down to 1737, says Chancellor KENT, the opinion of jurists was in favor of the right to confiscate, and many maintained that such debts were annulled by the declaration of war. Regarding such debts as annulled by war, the law-makers of that day never thought of making provision for the collection of the same on the restoration of peace between the belligerents. Commerce and civilization have wrought great changes in the spirit of nations touching the conduct of war, and in respect to the principles of international law applicable to the subject.

"Constant usage and practice of belligerent nations from the earliest times subjected enemy's goods in neutral vessels to capture and condemnation as prize of war, but the maxim is now universally acknowledged that 'free ships make free goods' which is another victory of commerce over the feelings of avarice and revenge. Individual debts, as a general remark, are no longer the subject of confiscation, and the rule is universally admitted that if not confiscated during the war, the return of peace brings with it both 'the right and the remedy.' *Wolf* v. *Oxholm*, 6 Maule & Selwyn, 92. * * *

"Old decisions, made when the rule of law was that war annulled all debts between the subjects of the belligerents, are entitled to but little weight, even if it is safe to assume that they are correctly reported, of which, in respect to the leading case of *Prideaux* v. *Webber*, 1 Levinz, 31, there is much doubt. *Miller* v. *Prideaux*, 1 Keble, 157; *Lee* v. *Rogers*, 1 Levinz, 110; *Hall* v. *Wybourne*, 2 Salked., 420; *Aubrey* v. *Fortescue*, 10 Modern, 205, are of the same class, and to the same effect. All of those decisions were made between parties who were citizens of the same jurisdiction, and most of them were made nearly a hundred years before the international rule was acknowledged, that war only suspended debts due to an enemy, and that peace had the effect to restore the remedy. The rule of the present day is, that debts existing prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived with the restoration of peace. * * *

"Text writers usually say, on the authority of the old cases referred to, that the non-existence of courts, or their being shut, is no answer to the bar of the statute of limitations, but Plowden says that things happening by an invincible necessity, though they be against common law, or an act of Parliament, shall not be prejudicial, that, therefore, to say that the courts were shut, is a good excuse on voucher of record. Exceptions not mentioned in the statutes have sometimes been admitted, and this court held that the time which elapsed while certain prior proceedings were suspended by appeal, should be deducted, as it appeared that the injured party in the meantime had no right to demand his money, or to sue for the recovery of the same; and in view of those circumstances, the court decided that his right of action had not accrued so as to bar it, although not commenced within six years. *Montgomery* v. *Hernandez*, 12 Wheaton, 129.

"But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a state may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close the courts, and to successfully resist the laws, until the bar of the statute becomes complete, which cannot for a moment be admitted. Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period.

"Judgment affirmed with costs." [1]

[1] *Semmes* v. *Hartford Ins. Co.*, 1871, 13 Wallace, 158; and *Brown* v. *Hiatts*, 1870, 1 Dill. 372. This latter was reversed by Supreme Court (15 Wall. 177) on a question

GRISWOLD v. WADDINGTON.

COURT OF ERRORS OF NEW YORK, 1819.

(16 *Johnson's Report*, 438.)

Before the breaking out of the war between the United States and England, in 1812, Joshua Waddington, an American citizen residing in New York, and Henry Waddington, a British subject residing in London, were partners in a commercial business. During the war, N. L. and G. Griswold had transactions with J. Waddington, in the United States. After the close of the war, the Griswolds sued to recover a balance of account arising out of those transactions; and their contention was that H. Waddington, the London partner, was liable for the debt.[1]

The Chancellor[2] [KENT]. —

"It appears to me, that the declaration of war did, of itself work a dissolution of all commercial partnerships existing at the time between British subjects and American citizens.

"By dealing with either party, no third person could acquire a legal right against the other, because one alien enemy cannot, in that capacity, make a private contract binding upon the other. This conclusion would seem to be an inevitable result from the new relations created by the war. It is a necessary consequence of the other proposition, that it is unlawful to have communication or trade with an enemy. To suppose a commercial partnership (such as this was) to be continued, and recognized by law as subsisting, when the same law had severed the subjects of the two countries, and declared them enemies to each other, is to suppose the law chargeable with inconsistency and absurdity. For what use or purpose could the law uphold such a connection, when all further intercourse, communication, negotiation, or dealing between the partners, was prohibited, as unlawful? Why preserve the skeleton of the firm, when the sense and spirit of it has fled, and when the execution of any one article of

of fact, not of law, and the case as reported in 1 Dill. 372 is an admirable statement and exposition of the law on this subject. See, also, *Stewart* v. *Kahn*, 1870, 11 Wall. 493, holding that an act of Congress providing a statute of limitations is constitutional and binding on State as well as Federal courts; *Levy* v. *Stewart*, 1870, 11 Wall. 244. In *O'Neal* v. *Boone*, 1869, 53 Ill. 35, it was held that the benefit of the Statute of Limitations did not accrue to a citizen of a loyal State who voluntarily crossed and resided within Confederate lines. — ED.

[1] Short statement substituted for that of the report. — ED.

[2] Only parts of the opinion of the learned Chancellor are given. — ED.

it by either, would be a breach of his allegiance to his country? In short, it must be obvious to every one, that a state of war creates disabilities, imposes restraints, and exacts duties altogether inconsistent with the continuance of that relation. Why does war dissolve a charter-party, or a commercial contract for a particular voyage? Because, says Valin, (tom. 1 p. 626,) the war imposes an insurmountable obstacle to the accomplishment of the contract; and this obstacle arising from a cause beyond the control of the party, it is very natural, he observes, that the charter-party should be dissolved, as of course. Why should the contract of partnership continue by law when equally invincible obstacles are created by law to defeat it? If one alien enemy can go and bind his hostile partner, by contracts in time of war, when the other can have no agency, consultation, or control concerning them, the law would be as unjust as it would be extravagant. The good sense of the thing as applicable to this subject, is the rule prescribed by the Roman law, that a copartnership in any business ceased when there was an end put to the business itself. *Item si alicujus rei societas sit, et finis negotio impositus est, finitur societas.* (Inst. 3, 26, 6.)

"The doctrine, that war does not interfere with private contracts, is not to be carried to an extent inconsistent with the rights of war.

"Suppose that H. & J. W. had entered into a contract before the war, which was to continue until 1814, by which one of them was to ship, half yearly, to London, consigned to the other, a cargo of provisions, and the other, in return, to ship to New York a cargo of goods. The war which broke out in 1812, would surely have put an end to the further operation of this contract, lawful and innocent as it was when made. No person could raise a doubt on this point; and what sanctity or magic is there in a contract of copartnership, that it must not yield to the same power?

"If we examine, more particularly, the nature and objects of commercial partnerships, it would seem to be contrary to all the rules by which they are to be construed and governed, that they should continue to exist, after the parties are interdicted by the government, from any communication with each other, and are placed in a state of absolute hostility. It is of the essence of the contract that each party should contribute something valuable, as money, or goods, or skill and labor on joint account, and for the common benefit; and that the object of the partnership should be lawful, and honest business.

"But how can the partners have any unity of interest, or any joint object that is lawful, when their pursuits, in consequence of the war, and in consequence of the separate allegiance which each owes to his own government, must be mutually hostile?

"The commercial business of each country, and of all its people, is an object of attack, and of destruction to the other. One party may be engaged in privateering, or in supplying the fleets and armies of his country with provisions, or with munitions of war; and can the law recognize the other partner as having a joint interest in the profits of such business? It would be impossible for the one partner to be concerned *in any commercial business*, which was not auxiliary to the resources and efforts of his country in a maritime war. And shall the other partner be lawfully drawing a revenue from such employment of capital, and such personal services directed against his own country? We cannot contemplate such a confusion of obligation between the law of partnership and the law of war, or such a conflict between his interest as a partner, and his duty as a patriot, without a mixture of astonishment and dread. Shall it be said that the partnership must be deemed to be abridged during war, to business that is altogether innoxious and harmless?

"But I would ask, how can we cut down a partnership in that manner, without destroying it? The very object of the partnership, in this case, was, no doubt, commercial business between England and the United States, and which the hostile state of the two countries interdicted; or it may have been business in which the personal communication and advice of each partner was deemed essential, and without which the partnership would not have been formed. It is one of the principles of the law of partnership, that it is dissolved by the death of any one of its members, however numerous the association may be; and the reason is this; the personal qualities of each partner enter into the consideration of the contract, and the survivors ought not to be held bound without a new assent, when perhaps, the character of the deceased partner was the inducement to the connection.

"Shall we say that the partnership continues during war, in a quiescent state, and that the hostile partners do not share in each other's profits, made in carrying on the hostile commerce of each country?

"It would be then most unjust to make the party who did not share in profit to share in loss, and to be bound by the other's contracts; but if one partner does not share in profit, that alone destroys a partnership. It would be what the Roman lawyers called *Societas leonina*, in allusion to the fable of the lion, who, having entered into a partnership with the other animals of the forest in hunting, appropriated to himself all the prey.

"It is one of the fundamental principles of every commercial partnership, that each partner has the power to buy and sell and

pay and receive, and to contract and bind the firm. But then, again, as a necessary check to this power, each partner can interfere and stop any contract about to be made by any one of the rest. This is an elementary rule, derived from the civil law. In *re pari potiorem causam esse prohibentis constat.* (Pothier, Trait. du Cont. sec. n. 90.)

"But if the partnership continues in war between hostile associates, this salutary power is withdrawn, and each partner is left defenceless. If the law continues the connection, after it has destroyed the check, the law is then cruel and unjust.

"In speaking of the dissolution of partnerships, the French and civil law writers say, that partnerships are dissolved by a change of the condition of one of the parties which disables him to perform his part of the duty, as by a loss of liberty, or banishment, or bankruptcy, or a judicial prohibition to execute his business, or by confiscation of his goods.

"The English law of partnership is derived from the same source; and as the cases arise, the same principles are applied. The principle here is, that when one of the parties becomes disabled to act, or when the business of the association becomes impracticable, the law, as well as common reason, adjudges the partnership to be dissolved. * * *

"Another objection was raised, from the want of notice of the dissolution of the partnership. The answer to this is extremely easy, and perfectly conclusive. Notice is requisite when a partnership is dissolved by the act of the parties, but it is not necessary when the dissolution takes place, by the act of the laws. The declaration of war, from the time it was duly made known to the nations, put an end to all future dealings between the subjects and citizens of the two countries, and, consequently, to the future operation of the copartnership in question.

"The declaration of war was, of itself, the most authentic and monitory notice. Any other notice, in a case like this, between two public enemies, who had each his domicil in his own country, would have been useless. All mankind were bound to take notice, of the war, and of its consequence. The notice, if given, could only be given by each partner in his own country; and there it would be useless, as his countrymen could not hold any lawful intercourse with the enemy. It could not be given as a joint act, for the partners cannot lawfully commune together.

"But, it was said, that the peace had a healing influence, and restored the parties to all their rights, and arrested all confiscations, and forfeitures, which had not previously and duly attached. I do

not know that I differ from the counsel in any just application of this doctrine.

"As far as the war suspended the right of action existing in the adverse party prior to the war, that right revived; but if the contract in this case was unlawful, peace could not revive it, for it never had any legal existence. So, too, the copartnership being once dissolved by the war, it was extinguished forever, except as to matters existing prior to the war."

MATTHEWS v. McSTEA.

Supreme Court of the United States, 1875.

(91 *United States*, 7.)

Mr. Justice Strong delivered the opinion of the court.

The single question which this record presents for our consideration is, whether a partnership, where one member of the firm resided in New York and the others in Louisiana, was dissolved by the war of the rebellion prior to April 23, 1861.

That the civil war had an existence commencing before that date must be accepted as an established fact. This was fully determined in *The Prize Cases*, 2 Black, 635; and it is no longer open to denial. The President's proclamation of April 19, 1861, declaring that he had deemed it advisable to set on foot a blockade of the ports within the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, was a recognition of a war waged, and conclusive evidence that a state of war existed between the people inhabiting those States and the United States.

It must also be conceded, as a general rule, to be one of the immediate consequences of a declaration of war and the effect of a state of war, even when not declared, that all commercial intercourse and dealing between the subjects or adherents of the contending powers is unlawful, and is interdicted. The reasons for this rule are obvious. They are, that, in a state of war, all the members of each belligerent are respectively enemies of all the members of the other belligerent; and, were commercial intercourse allowed, it would tend to strengthen the enemy, and afford facilities for conveying intelligence, and even for traitorous correspondence. Hence it has become an established doctrine, that war puts an end to all commercial dealing between the citizens or subjects of the nations or powers at war, and "places every individual of the respective governments, as well as the governments

themselves, in a state of hostility:" and it dissolves commercial partnerships existing between the subjects or citizens of the two contending parties prior to the war; for their continued existence would involve community of interest and mutual dealing between enemies.

Still further, it is undeniable that civil war brings with it all the consequences in this regard which attend upon and follow a state of foreign war. Certainly this is so when civil war is sectional. Equally with foreign war, it renders commercial intercourse unlawful between the contending parties, and it dissolves commercial partnerships.

But, while all this is true as a general rule, it is not without exceptions. A state of war may exist, and yet commercial intercourse be lawful. They are not necessarily inconsistent with each other. Trading with a public enemy may be authorized by the sovereign, and even, to a limited extent, by a military commander. Such permissions or licenses are partial suspensions of the laws of war, but not of the war itself. In modern times, they are very common. Bynkershoek, in his Quæst. Jur. Pub., lib. 1, c. 3, while asserting as a universal principle of law that an immediate consequence of the commencement of war is the interdiction of all commercial intercourse between the subjects of the states at war, remarks: "The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the laws of war as to commerce. Hence it is alternatively permitted and forbidden in time of war, as princes think it most for the interests of their subjects. A commercial nation is anxious to trade, and accommodates the laws of war to the greater or lesser want that it may be in of the goods of others. Thus sometimes a mutual commerce is permitted generally; sometimes as to certain merchandise only, while others are prohibited; and sometimes it is prohibited altogether." Halleck, in his "Treatise on the Laws of War," p. 676 *et seq.*, discusses this subject at considerable length, and remarks: "That branch of the government to which, from the form of its constitution, the power of declaring or making war is intrusted, has an undoubted right to regulate and modify, in its discretion, the hostilities which it sanctions. * * * In England, licenses are granted directly by the crown, or by some subordinate officer to whom the authority of the crown has been delegated, either by special instructions, or under an act of Parliament. In the United States, as a general rule, licenses are issued under the authority of an act of Congress; but in special cases and for purposes immediately connected with the prosecution of the war, they may be granted by the authority of the President, as commander-in-chief of the military and naval forces of the United States.

It being, then, settled that a war may exist, and yet that trading with the enemy, or commercial intercourse, may be allowable, we are brought to inquire whether such intercourse was allowed between the loyal citizens of the United States and the citizens of Louisiana until the 23d of April, 1861, when the acceptance was made upon which this suit was brought. And, in determining this, the character of the war and the manner in which it was commenced ought not to be overlooked. No declaration of war was ever made. The President recognized its existence by proclaiming a blockade on the 19th of April; and it then became his duty as well as his right to direct how it should be carried on. In the exercise of this right, he was at liberty to allow or license intercourse; and his proclamations, if they did not license it expressly, did, in our opinion, license it by very cogent implications. It is impossible to read them without a conviction that no interdiction of commercial intercourse, except through the ports of the designated States, was intended. The first was that of April 15, 1861. The forts and property of the United States had, prior to that day, been forcibly seized by armed forces. Hostilities had commenced; and, in the light of subsequent events, it must be considered that a state of war then existed. Yet the proclamation, while calling for the militia of the several States, and stating what would probably be the first service assigned to them, expressly declared that, "in every event, the utmost care would be observed, consistently with the repossession of the forts, places, and property which had been seized from the Union, to avoid any devastation, destruction of or interference with property, or any disturbance of peaceful citizens in any part of the country." Manifestly, this declaration was not a mere military order. It did not contemplate the treatment of the inhabitants of the States in which the unlawful combinations mentioned in the proclamation existed as public enemies. It announced a different mode of treatment, — the treatment due to friends. It is to be observed that the proclamation of April 15, 1861, was not a distinct recognition of an existing state of war. The President had power to recognize it, *The Prize Cases, supra;* but he did not prior to his second proclamation, that of April 19, in which he announced the blockade. Even then the war was only inferentially recognized; and the measures proposed were avowed to be "with a view to * * * the protection of the public peace and the lives and property of quiet and orderly citizens pursuing their lawful occupations, until Congress shall have assembled." The reference here was plainly to citizens of the insurrectionary States; and the purpose avowed appears to be inconsistent with their being regarded as public enemies, and consequently debarred from intercourse with the inhabi-

tants of States not in insurrection. The only interference with the business relations of citizens in all parts of the country, contemplated by the proclamation, seems to have been such as the blockade might cause. And that it was understood to be an assent by the executive to continued business intercourse may be inferred from the subsequent action of the government (of which we may take judicial notice) in continuing the mail service in Louisiana and the other insurrectionary States long after the blockade was declared. If it was not such an assent or permission, it was well fitted to deceive the public. But in a civil more than in a foreign war, or a war declared, it is important that unequivocal notice should be given of the illegality of traffic or commercial intercourse; for, in a civil war, only the government can know when the insurrection has assumed the character of war.

If, however, the proclamations, considered by themselves, leave it doubtful whether they were intended to be permissive of commercial intercourse with the inhabitants of the insurrectionary States, so far as such intercourse did not interfere with the blockade the subsequent act of Congress, passed on the thirteenth day of July, 1861, ought to put doubt at rest.

The act was manifestly passed in view of the state of the country then existing, and in view of the proclamation the President had issued. It enacts that, in a case therein described, a case that then existed, "it may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such State, or any section or part thereof where such insurrection exists, are in a state of insurrection against the United States; and *thereupon* all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue." Under authority of this act, the President did issue such a proclamation on the 16th of August, 1861; and it stated that all commercial intercourse between the States designated as in insurrection and the inhabitants thereof, with certain exceptions, and the citizens of other States and other parts of the United States, was unlawful. Both the act and the proclamation exhibit a clear implication that, before the first was enacted and the second was issued, commercial intercourse was not unlawful; that it had been permitted. What need of declaring it should cease, if it had ceased, or had been unlawful before? The enactment that it should not be permitted after a day then in the future must be considered an implied affirmation that up to that day it was lawful; and certainly Congress had the power to relax any of the ordinary rules of war.

We think, therefore, the Court of Appeals was right in holding

that the partnership of Brander, Chambliss & Co. had not been dissolved by the war, when the acceptance upon which the plaintiff in error is sued was made.

The judgment is affirmed.

NEW YORK LIFE INS. CO. v. STATHEM.

SAME v. SEYMS.

MANHATTAN LIFE INS. CO. v. BUCK, Executor.

Supreme Court of the United States, 1876.

(93 *United States*, 24.)

The first of these cases is here on appeal from, and the second and third on writs of error to, the Circuit Court of the United States for the Southern District of Mississippi.

The first case is a bill in equity, filed to recover the amount of a policy of life assurance, granted by the defendant (now appellant) in 1851, on the life of Dr. A. D. Stathem, of Mississippi, from the proceeds of certain funds belonging to the defendant attached in the hands of its agent at Jackson, in that State. It appears from the statements of the bill that the annual premiums accruing on the policy were all regularly paid, until the breaking out of the late civil war, but that, in consequence of that event, the premium due on the 8th of December, 1861, was not paid; the parties assured being residents of Mississippi, and the defendant a corporation of New York. Dr. Stathem died in July, 1862.

The other cases are similar.

Each policy contained various conditions, upon the breach of which it was to be null and void; and amongst others the following: "That in case the said (assured) shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine."

The Manhattan policy contained the additional provision, that, in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The non-payment of the premiums in arrear was set up in bar of the actions; and the plaintiffs respectively relied on the existence

of the war as an excuse, offering to deduct the premiums in arrear from the amounts of the policies.

The decree and judgments below were against the defendants.

Mr. Justice BRADLEY, after stating the case, delivered the opinion of the court.

"We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. * * *

"Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. * * *

"The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

"But the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended.

"Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition?

"If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble, for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

"The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

"In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival.

"It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk.

"But the good risks are never heard from; only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily lose the cases, which are desirable, would be manifestly unjust. An injured person, as before stated, does not stand isolated and alone. His case is connected with and correlated to the cases of all others insured by the same company.

"The nature of the business, as a whole, must be looked at to understand the general equities of the parties.

"We are of opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life-insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.

"The question then arises, Must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush, it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus: Suppose an inhabitant of Georgia had bargained for a house, situated in a Northern city, to be paid for by instalments, and no title to be made until all the instalments were paid, with a condition that on the failure to pay any of the instalments when due, the contract should be at an end, and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now,

if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition, and to resell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could, by possibility, have been avoided.

"But it was caused by an event beyond the control of either party, —an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should, *ex æquo et bono*, be returned to him. This would clearly be demanded by justice and right.

"And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy. * * *

"We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

"Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover the equitable value of the policies with interest from the close of the war. * * *

"In estimating the equitable value of a policy, no deduction should be made from the precise amount which the calculations give, as is sometimes done where policies are voluntarily surrendered, for the purpose of discouraging such surrenders; and the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forfeited. In each case

the rates of mortality and interest used in the tables of the company will form the basis of the calculation.

"The decree in the equity suit and the judgments in the actions at law are reversed, and the causes respectively remanded to be proceeded with according to law and the directions of this opinion.

CLIFFORD, J., (with whom concurred HUNT, J.,) dissenting:—

"Where the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war, and revives when peace ensues; and that rule, in my judgment, is as applicable to the contract of life-insurance as to any other executory contract.

"Consequently, I am obliged to dissent from the opinion and judgment of the court in these cases."[1]

[1] In *New York Life Ins. Co.* v. *Davis*, 1877, 95 U. S. 425, the facts were the same, except that the Insurance Co. had an agent in the Confederacy to whom the insured, a Major in the Confederate service, vainly tendered the premium as it fell due. Under the circumstances, the court, following the principal decision, said per Mr. Justice Bradley: —

"We do not mean to say that, if the defendant had continued its authority to the agent to act in the receipt of premiums during the war, and he had done so, a payment or tender to him in lawful money of the United States would not have been valid; nor that a stipulation to continue such authority in case of war made before its occurrence would not have been a valid stipulation; nor that a policy of life insurance on which no premiums were to be paid, though suspended during the war, might not have revived after its close. We place our decision simply on the ground that the agency of Garland was terminated by the breaking out of the war, and that, although by the consent of the parties it might have been continued for the purpose of receiving payments of premiums during the war, there is no proof that such assent was given, either by the defendant or by Garland; but that, on the contrary, the proof is positive and uncontradicted that Garland declined to act as agent."

In the course of the opinion the court considers and approves the following authorities as payment to agents in an enemy's country: *Conn* v. *Penn.*, 1818, Pet. C. C. 496 (the leading authority); *Dennison* v. *Imbrie*, 1818, 3 Wash. 396; *Buchanan* v. *Curry*, 1821, 19 Johns. 137; *Ward* v. *Smith*, 1868, 7 Wall. 447; *Brown* v. *Hiatts*, 1872, 15 Wall. 177; *Montgomery* v. *U. S.*, 1872, 15 Wall. 395; *Fretz* v. *Stover*, 1874, 22 Wall. 198.

In regard to the influence of war on life insurance policies it may be said that three essentially distinct views have been held by courts of last resort, and reference is made to *Abell* v. *Penn. Mutual Life Ins. Co.*, 1881, 18 West Va. 400, 423–435 for their enumeration, and criticism of the authorities cited.

In *Semmes* v. *Hartford Ins. Co.*, 1871, 13 Wall. 158, the action was upon a policy of fire insurance containing the express stipulation that no suit should be sustainable thereunder unless brought within twelve months after the loss or damage occurred. The civil war broke out during the twelve months within which the suit should and no doubt would have been brought. As it was impossible to bring suit during the war,

WARE v. JONES.

SUPREME COURT OF ALABAMA, 1878.

(61 *Alabama*, 288.)

BRICKELL, C. J. The instructions given the jury, and the first instruction requested by the appellant and refused, involve the same question — the validity of a contract made during the war, for the sale of property, real and personal, the seller knew the purchaser was buying, to be used in the making of iron for the Confederate States, to aid and assist them in the prosecution of hostilities against the United States. The question has been several times, in various forms, presented to this court, and with one exception such contracts have been declared void.

In *Shepherd* v. *Reese*, 42 Ala. 329, a horse was purchased, the note given for the price, expressing that the horse was "to go in Captain Smith's mounted company, the horse to be paid for as he draws his money." The proof showed the horse was purchased for use in the service of the Confederate States. The question was, whether a recovery could be had on the note. The court pronounced it void, as opposed to the national policy and the Constitution. At the succeeding term, in *Patton* v. *Gilmer*, 42 Ala. 548, the facts were that the State of Alabama had advanced a large sum of money to an association or corporation, organized for the manufacture of arms, upon a contract to deliver to the State, arms of a certain number and description, and the corporation had given bond for the performance of the contract. The action was upon the bond, assigning several breaches of the contract, and it was held the action could not be maintained. The principle of the decision is, that all contracts which are hostile to, or violative of the Constitution or laws of the United States, are invalid, whether made by individuals, or the State. And that though the contract was made during the war, when the authority and laws

this condition was not performed. It was held by the court that the condition was entire and not divisible; that as performance became impossible by operation of law, the assured was entirely released from the obligation of bringing suit within the twelve months; that the action could, therefore, be maintained at any time within the statute of limitations. In other words, war suspends but does not extinguish conditions of a contract, so that on the return of peace the entire conventional stipulation as regards time revives as of right. In case of a statutory limitation within which the suit may or must be brought, the period during which the courts were closed by reason of war is deducted and the plaintiff is given the balance of time to bring the action which the war prevented him from doing. See Wambaugh, Cases on Insurance (1902), 651, note, for an exhaustive citation of adjudicated cases. — ED.

of the United States were by force superseded, and the authority and laws of the Confederate States were dominant, it cannot now be enforced in the courts of the State, bound to the Constitution of the United States, as the supreme law of the land. In *Oxford Iron Company* v. *Quinchett*, 44 Ala. 487, a contract for the loan or hire of mules to a party, known at the time to be engaged in the manufacture of iron for the Confederate government, with a knowledge on the part of the bailor that they were to be employed in the work, was declared invalid. In *Oxford Iron Company* v. *Spradley*, 46 Ala. 98, a promissory note given by a corporation for the loan of money, to be used in erecting iron works and making iron for the Confederate government, if at the time of the loan the lender knew the purposes for which it was borrowed, was pronounced void. In *Milner* v. *Patton*, 49 Ala. 423, the action was on an account for goods sold and delivered, the seller knowing the purchaser intended to use them in clothing Confederate soldiers, and it was held the action was not maintainable. Opposed to these cases stands the case of *Thedford* v. *McClintock*, 47 Ala. 423, which was expressly overruled in the case of *Milner* v. *Patton*, *supra*. See, also, *Bibb* v. *Commissioner's Court*, 44 Ala. 119; *Speed* v. *Cocke*, 57 Ala. 209.

These decisions must be taken as settling definitely, and finally, the law of this State, upon the question now involved; as they are supported by the decisions of the Supreme Court of the United States, though they may be opposed to the decisions of other States, we are not inclined to re-open a discussion of the reasoning on which they proceed. *Hanauer* v. *Doane*, 12 Wall. 342; *Hanauer* v. *Woodruff*, 15 Wall. 439. The act of Congress of August 6, 1861 (U. S. Stat. Vol. XII, 319), subjected to confiscation property of any kind or description purchased or acquired, or sold, with intent to use or employ the same, or to suffer the same to be used or employed in aiding or abetting or promoting the insurrection. The property in this case was not only sold with a knowledge that it was to be so used, but the seller was a member of the corporation formed to promote the use, and suffered it to be used first in the completion of a contract he had made to supply a contractor with the Confederate States with iron for making arms, and then in supplying the government itself. Such, at least, there was evidence tending to show, and it was in reference to the evidence the instructions were given and refused. Contracts prohibited by a statute, even when a penalty is not imposed for a violation, are void. *McGehee* v. *Lindsay*, 6 Ala. 16. It is said this statute was not operative in Alabama when this contract was made. But it is now of force, and as obligatory on the courts of justice within the State, as if Alabama had then, as now

recognized the Constitution and laws of the United States, as the supreme law. The answer of Judge, J., to a similar argument in *Shepherd* v. *Reese*, *supra*, was: "The contract stands, therefore, as one executed in a foreign government; and testing its legality by the *lex loci contractus*, it must be pronounced to have been a valid contract at the time and place it was made. But can it be enforced in a court acting under the authority and Constitution of the United States? We understand the law to be well settled that it cannot be if it is opposed to the national policy or national Constitution?" In the instructions given and refused, we are considering, the Circuit Court did not err.

The second instruction requested by the appellant asserts there is material difference between a sale to the Confederate States, or to its agents for its use, and a sale to an individual who expected to profit by it in making contracts for its use with the Confederate States. The instruction does not point out in what the difference consists. The guilty knowledge of the seller which avoids the contract may be more apparent in the one instance than the other, from the character of the person with whom the contract is made. But in the legal consequences resulting from the contract there is no difference. The reason in either instance the contract is held void is, because it cannot be reasonably supposed, that a party knowing another intended an illegal purpose, would directly or indirectly furnish the means of accomplishing it, if he did not intend to aid and assist it. *Degroot* v. *Van Duger*, 20 Wend. 390; *Hanauer* v. *Doane*, *supra*; Story's Con. Laws, §§ 253, 254.

Expressions may be found in judicial decisions, and in text-books, which seem to cast reproach on a party resisting the performance of contracts into which he has voluntarily entered, because of their illegality, and would indicate that the law looks upon the defence with disfavor. Similar expressions may be found in reference to the statute of limitations, and at one time, courts were so far led astray by them, that the statute lost much of its vigor. Such expressions are the individual opinions of the judge, or the text-writer, employing them, and are not to be accepted as rules of law. The law does not regard the defence with favor or disfavor — it does not inquire whether there are or are not circumstances in the particular case, which render the defence immoral and dishonest, or render it meritorious, and a shield to the party making it, from an unconscionable demand by his adversary, who may be cruelly standing on the *letter of the bond*. The law does not look with favor or disfavor to the one party or the other, declares them *in pari delicto*, and abstains from all interference between them.

The presumption of law is in favor of the legality of contracts, and when on the court is devolved the duty of construction, if it is fairly and reasonably susceptible of two interpretations — one rendering it legal, and the other illegal, that interpretation will be adopted which will support, rather than that which will defeat it. 1 Brick. Dig. 386, § 164; 2 Chit. Con. 977. Following out the principle, illegality of consideration will not be inferred, when the evidence is justly and reasonably capable of being reconciled with the hypothesis of legality. The general rule applies, that fraud or illegality is not to be presumed; the party affirming the one or the other, must prove it clearly if it is denied. 2 Chit. Con. 978. It is enough, however, if the evidence is sufficient to produce in the minds of the jury that degree of conviction essential in civil cases — it is not necessary, as in criminal cases, that it should remove all reasonable doubt. If the appellant had requested the court simply to instruct the jury, that the defence in the present case ought to be clearly proved, we do not inquire whether the instruction ought to have been given — without an explanation it would have probably misled; and instructions requested which, without explanation, may mislead, are properly refused. The instruction as to the clearness of the evidence was connected with the affirmation that the law disfavored the defence as immoral and dishonest, which was not correct, and being incorrect in part, was refused properly; for it was not the duty of the court to analyze the charge disconnecting the correct from the incorrect.

Let the judgment be affirmed.[1]

[1] In *Whitis* v. *Polk*, 1871-2, 36 Tex. 602, a carefully considered and authoritative case, it is said, at p. 627: "The public policy of the United States during the war was to stop all commerce or trade by the rebel States or the citizens thereof with the outside world, to prevent all intercourse whatever — even with neutral governments — that all aid or comfort might be cut off, to the end that the rebel power might the sooner be put down and the citizens forced to their rightful allegiance. This was a policy the government had a right to inaugurate, and to put in force to any extent. The contract sued on was in direct conflict with this policy, and for that reason is entitled to no favorable consideration by the courts. That contracts against the law and public policy cannot be enforced is fully recognized in *Coppell* v. *Hall*, 7 Wallace, 543, and in *Hanauer* v. *Doane*, 12 Wallace, 342; *Hunt's heirs* v. *Hunt*, 1 Texas, 758; *Goodman* v. *McGehee*, 31 Texas, 253, and *Griswold* v. *Waddington*, 16 Johnson, 438.

"Again, if this contract was made in aid of the then existing rebellion, it was null and void, and should not now be enforced. This doctrine has been so often and with so great unanimity announced by almost every court in the country, that we deem it unnecessary to refer to but few authorities. In the case of *Hanauer* v. *Doane*, 12 Wallace, Justice Bradley, after a very thorough examination of authorities on that question, comes to the conclusion that 'he who, being bound by his allegiance to a government, sells goods to an agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose,' or does any other act to aid that combination, 'is himself guilty of treason or misprision

SECTION 29. — TRADE WITH THE ENEMY.

THE "HOOP."

HIGH COURT OF ADMIRALTY, 1799.

(1 *C. Robinson*, 196.)

Judgment. — SIR W. SCOTT. — "This is the case of a ship laden with flax, madder, geneva, and cheese, and bound from Rotterdam ostensibly to Bergen; but she was in truth coming to a British port, and took a destination to Bergen to deceive the French cruisers; and, as

thereof.' The appellee in this case, knowing that the only resource for the Confederate army in obtaining clothing and supplies, consisted in the cotton of the country, and knowing also that very rigid exactions were laid upon all cotton in the State by the Confederate authorities, even to one-half of the entire crop, and knowing also that no cotton could be got out of the country without satisfying those exactions in one way or the other, voluntarily purchased Bowles's cotton for the purpose of sending the same out of the country to market, and then made a bargain with the appellant to pay the Confederate exactions, and procure what were known as permits for sending the same beyond the Confederate lines, and at the same time knowing that the whole transaction was in direct violation of the laws and public policy of the United States, can now hardly plead innocence, or an exemption from the legitimate consequence of his acts. He is to all intents and purposes as culpable as though his contract had been made directly with the Confederate authorities, in which he had bound himself to buy cotton and give one-half to the Confederacy for permits to ship the other half; and the one entered into was in direct aid of the rebellion, to a very large amount. It is entirely immaterial how appellent procured the permits from the Confederate agents, or whether the Confederacy was paid a part of the identical cotton turned over by appellee, or whether it was paid out of other cotton, or in money; yet the permits represented the interest of the Confederate authorities, and appellee agreed to give all that they represented; and that agreement was in aid of the rebellion, and therefore treasonable and void, and the courts cannot now be prostituted to take jurisdiction of or aid either party in the enforcement of the execution of the same. *Hanauer* v. *Doane*, 12 Wallace; *Goodman* v. *McGehee*, 31 Texas, 254; *Pridgeon* v. *Smith*, 31 Texas, 171; *Ransom* v. *Alexander*, 31 Texas, 443; also, *Emancipation Cases*, 31 Texas, 534."

In *Isaacs, Taylor & Williams* v. *City of Richmond*, 1893, 60 Va. 30, 36, it is held, *inter alia*, that fifteen thousand dollars paid "on account of a house and furniture for Mr. Davis" fell within expenditure in aid of rebellion and therefore illegal.

In *Dewing* v. *Perdicaries*, 1877, 96 U. S. 193, court said: "Nothing is better settled in the jurisprudence of this city than that all acts done in aid of the rebellion were illegal and of no validity. The principle has become axiomatic. It would be a mere waste of time to linger upon the point for the purpose of discussing it. *Texas* v. *White*, 7 Wall. 700; *Hickman* v. *Jones*, 9 id. 197; *Hanauer* v. *Doane*, 12 id. 342; *Knox* v. *Lee*, id. 457; *Hanauer* v. *Woodruff*, 15 id. 439; *Cornet* v. *Williams*, 20 id. 226; *Sprott* v. *United States*, id. 459." To which may be added, although axiomatic, the following two authorities: *U. S.* v. *Huckbee*, 1872, 16 Wall. 414; *Whitfield* v. *U. S.*, 1875, 92 U. S. 165. See, also, *Bragg* v. *Tuffts*, 1887, 49 Ark. 454, 562. — ED.

the claim discloses (of which I see no reason to doubt the truth), the goods were to be imported on account of British merchants, being most of them articles of considerable use in the manufactures and commerce of this country, and being brought under an assurance from the commissioners of customs in Scotland that they might be lawfully imported without any license, by virtue of the statute 35 Geo. 3, c. 15, § 180. [1]

"It is said that these circumstances compose a case entitled to great indulgence; and I do not deny it. But if there is a rule of law on the subject binding the court, I must follow where that rule leads me; though it leads to consequences which I may privately regret, when I look to the particular intentions of the parties.

"In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as an universal principle of law.—'Ex naturâ belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis decarant, etc.' He proceeds to observe, that the interests of trade, and the necessity of obtaining certain commodities have sometimes so far overpowered this rule, that different species of traffic have been permitted, '*prout e re sua, subditorumque suorum esse censent principes*' (Bynk. Q. J. P. B. 1, c. 3.) But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war *quo ad hoc*. It is, as he expresses it, '*pro parte sic bellum, pro parte pax inter subditos utriusque principes.*' It appears from these passages to have been the law of Holland; Valin, l. iii., tit. 6, art. 3, states it to have been the law of France, whether the trade was attempted to be carried on in national or in neutral vessels; it will appear in a case which I shall have occasion to mention, *The Fortuna*, to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of Europe.

"By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone therefore who

[1] The 35 G. 3, c. 15 (March 16, 1795), enacts, "that it shall be lawful to import such goods belonging to subjects of the United Provinces, or to any who were subjects before the 19th of January, 1795, or to any subject of his Majesty, to be landed and secured in warehouses for the benefit of the proprietor, and for the security of the revenue." Subsequent acts contain further regulations for property coming from Holland, in the ambiguous situation of the two countries at that time.

has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interest of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances which may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in a time of war had a right to carry on a commercial intercourse with the enemy, and under color of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government, charged with the care of the public safety?

"Another principle of law, of a less public nature, but equally general in its reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation at that time existing between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians *a persona standi in judicio*. The peculiar law of our own country applies this principle with great rigor. The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hâc vice*. But otherwise he is totally *ex lex;* even in the case of ransoms which are contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the impris-

oned hostage in the courts of his own country, for the recovery of his freedom. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection and against its authority. Bynkershoek expresses himself with great force upon this argument in his first book, chapter 7, where he lays down that the legality of commerce and the mutual use of courts of justice are inseparable; he says, that cases of commerce are undistinguishable from cases of any other species in this respect. 'Si hosti semel permittas actiones exercere, difficile est distinguere ex quâ causâ oriunter, nec potui animadvertere illam distinctionem usu fuisse servatam.'

"Upon these and similar grounds it has been the established rule of law of this court, confirmed by the judgment of the Supreme Court, that a trading with the enemy, except under a royal license, subjects the property to confiscation;—and the most eminent persons of the law sitting in the Supreme Court have uniformly sustained such judgments. * * *[1]

"I omit many other cases of the last and the present war merely on this ground that the rule is so firmly established, that no one case exists which has been permitted to contravene it,—for I take upon me to aver, that all cases of this kind which have come before that tribunal have received an uniform determination. The cases which I have produced, prove that the rule has been rigidly enforced:—where acts of parliament have on different occasions been made to relax the navigation-law and other revenue acts; where the government has authorized, under the sanction of an act of parliament, a homeward trade from the enemy's possession, but has not especially protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced where strong claim not merely of

[1] In support of this rule Sir W. Scott reviews a large number of cases decided on appeal by the Lords of Appeal. These cases are the following: *The Ringende Jacob*, 1750; *The Lady Jane*, 1749; *Deergaden*, 1747; *The Elizabeth*, 1749; *The Juffrow Louisa Margaretha*, 1781; *The St. Louis*, 1781; *The Victoria*, 1781; *The Comte de Wohrougoff*, 1781; *The Guidita*, 1785; *The Eenigheid*, 1795; *The Fortuna*, 1795; *The Freedom*, 1795; *The William*, 1795.

These were all cases in which the property in question was condemned, though some of them, like the case of the *Hoop*, were cases of great hardship upon British merchants. — Ed.

convenience, but almost of necessity, excused it, on behalf of the individual; that it has been enforced where carriages have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced not only against the subjects of the crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied states in war had a right to notice and apply, mutually, to each other's subjects. Indeed it is the less necessary to produce these cases, because it is expressly laid down by Lord Mansfield, as I understand him, that such is the maritime law of England." (*Gist* v. *Mason*, 1 T. R., 85.)

[In conclusion, Sir W. Scott held that the acts of Parliament in question were not intended to legalize the trade without special licenses; and that the law advisers of the commissioners were wrong in their conclusions to that effect. The property was therefore condemned according to the strict rule of law.]

POTTS v. BELL.

King's Bench, 1800.

(8 *Term Reports*, 548.)

This was the case of a neutral ship captured by a French cruiser on a voyage from Rotterdam to Hull, for having on board enemy property (English). These goods were bought in Rotterdam by the agent of an English house, after the breaking out of hostilities between France and England, and insured in an English company. An action was brought on the insurance policy.

The defendant insisted that the plaintiff was not entitled to recover; because the policy was void, inasmuch as it was not lawful to trade with the enemy. The Common Pleas found for the plaintiffs. But on appeal, this judgment was reversed:

Judgment,—Lord Kenyon, Ch., J.:—"The court had very fully considered the case immediately after the very learned argument which had been made by the King's advocate, Sir J. Nicholl, in the last term. That the reasons which he had urged and the authorities he had cited were so many, so uniform, and so conclusive to show that a British subject's trading with an enemy was illegal, that the question might be considered as finally at rest. That those authorities, it was true, were mostly drawn from the decisions of the admiralty

courts; and that though all diligence had been used, there was only one direct authority on the subject to be found in the common-law books, and that one was to the same effect. But that the circumstances of there being that single case only was strong to show that the point had not been since disputed, and that it might now be taken for granted that it was a principle of the common law that trading with an enemy without the King's license was illegal in British subjects. That it was therefore needless in this case to delay giving judgment for the sake of pronouncing the opinion of the court in more formal terms; more especially as they could do little more than recapitulate the judgment with the long train of authorities, already to be found in the clearest terms in the principal report of the case of the *Hoop* published by Dr. Robinson. That the consequence was that the judgment of the court of Common Pleas must be reversed."

FLINDT v. SCOTT.

SAME v. CROCKATT.

In the Exchequer Chamber, 1814.

(5 *Taunton*, 674)

Thomson, C. B. His lordship stated the declaration and the special verdict at large. The merits of this case must mainly, if not entirely, depend on the effect and operation of the license, under which the cargo, the subject of the insurance in question, was shipped. If the shipment made under the sanction of the license is legal, then the insurance on it must be so, too, and the underwriter is responsible for the loss that has happened by the seizure of the cargo, unless he can establish some good ground for being discharged from that responsibility. It is proper to consider the nature and end of such a license as the present, issued by the government of this country during hostilities with foreign nations; there can be no doubt that the sovereign may, during a war, equally license the trading of any of his subjects with an enemy, or license enemies to trade with his subjects. The great object of obtaining such an intercourse by such license was to provide the means of exporting, notwithstanding the pressure of war, the manufacturers of this country, and to receive in return from the other country such articles as we most stood in need of; and that was particularly the case with respect to Russia: we wanted the produce of that country in general, and espe-

cially the article of naval stores. And these licenses to trade, however they may have been formerly construed strictly, are now in all courts construed more liberally, and favorably to trade, in order to effectuate the benefits intended to result from them. There is in the present instance nothing, either in the terms of the license, or in the principles of public policy, which ought to restrict the operation of the authority given to the exportation of property belonging to the subjects of this country only; on the contrary, the license is granted to Gustavus Flindt and Co. of London, merchants, on behalf of themselves and others, to export a cargo from London to Archangel, being an enemy's port, and to import from thence in the same ship a cargo of such goods as are permitted by law to be imported (with some exceptions), to any port in the United Kingdom, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any neutral or hostile port, and to whomsoever such property may appear to belong: terms, which to me sufficiently indicate that the cargo, either outwards or homewards, might legally comprehend the property of enemies. And these terms have been adopted for that very purpose, which terms in the opinion of the very learned judge of the Court of Admiralty (as appears from the case of the *Cousine Marianne*), have in that court been held to exclude all inquiry in whom the property is vested. Our government, in licensing a trade directly with the enemy at this port, must have had a view both to exportation and importation. Why may not the license be construed to permit the exportation of a cargo by an enemy to that hostile port, from whence the return cargo is to be imported? The cargo exported from this country must necessarily be consigned to, and ultimately become the property of a foreigner at that port: why then may it not be permitted to the foreigner at once to acquire the property here, and to export the goods by his agent in this country? In *Feise and Another* v. *Bell*, 4 Taunt. 4, under a license to a British merchant by name, on behalf of himself and others, to export a cargo to St. Petersburg, and to import a cargo from thence; though an alien enemy was interested both in the exported and imported cargoes, yet the Court of Common Pleas held that it was no objection to the plaintiff's recovering on their insurance. In *Morgan* v. *Oswald*, 3 Taunt. 554, a question arose upon a license granted to a British merchant, that a ship might go to an hostile port, and bring home a cargo of goods. It permitted a vessel, bearing any flag except the French, to proceed in ballast from any port north of the Scheldt, to Archangel, or any other port in the White Sea, there to load a cargo of such goods as were permitted by law to be imported (with some exceptions), and to proceed with the same to a port of the

United Kingdom. It was held, that license authorized the importation of goods, the property of an alien enemy, the subject of that hostile country; and therefore authorized him to insure and to enforce his contract of insurance in the courts of this country. In the case of *Robinson* v. *Touray*, 1 Maule & Selw. 217, which arose on the same ship, license and policy, the Court of King's Bench adopted the same doctrine. In the case of *Fenton and Another, Assignees of Rennauds, Bankrupts*, v. *Pearson*, 15 East, 419, the Court of King's Bench determined that a trading license from the crown to British merchants to send a ship in ballast to an enemy's port, there to receive and load a cargo, and import it into this country, by legalizing the purchase by the subject, legalized the sale by the enemy, and impliedly legalized his right to stop the goods *in transitu*, after their arrival in port here, upon the intermediate insolvency of the vendees, the whole price not being paid, and the part that had been paid being offered to be refunded; and that the alien enemy was permitted to employ an agent here for that purpose. The assignees of the vendees, who had become bankrupts, were therefore not allowed to recover against him in an action of trover. The second objection made to the plaintiff's recovering in this case was, that the underwriters were not answerable for this loss, because it was occasioned by the act of the Russian Government, to which the persons interested must be supposed to have given their assent, they being Russians. And in support of that position two cases were cited, *Touteng* v. *Hubbard*, 3 Bos. & Pull. 291, and *Conway* v. *Gray*, 10 East, 554. The first was a case where a British merchant chartered a Swedish ship on a voyage to St. Michael's for a cargo of fruit, and the charter-party contained the usual exception against the restraint of princes; and the ship being prevented from reaching St. Michael's within the fruit season by an embargo laid on Swedish vessels by the British Government, the question was, whether the Swedish owner acquired a right, by proceeding on the voyage after the embargo was taken off (when it was too late to obtain a cargo), to recover the freight against the British merchant. The court determined that he had no such right; and they went farther, and determined, what was not then a question before them, that an insurance upon the property of a foreigner against a loss remotely occasioned by an act of his own state would be illegal. It was not the main question in that case, though certainly it was so decided. The case of *Conway* v. *Gray* proceeded in a degree on the authority of *Touteng* v. *Hubbard*. In that case it was decided, that an American subject could not recover for a loss sustained by reason of an embargo laid on in one of the ports of his own country by his own government. But these decisions, even sup-

posing them to be correct as applied to the cases in which they were made, do not affect the present case; for if this license is to be deemed (which I think it is) sufficient to cover the Russian property, and authorizes a trading to the enemy's port, that incidentally legalizes the insurances made on that property, which must protect it throughout, till the conclusion of that risk, just as if it had belonged to British subjects. The underwriters, knowing that these goods are going to Russia, to an enemy's port, and being willing that the adventure should proceed with simulated papers and documents, assent to the design of the owners of the goods to contravene the regulations of that country, to which they are to be consigned, and take on themselves the risk of confiscation in the event of the fraud being detected. The effect of the license is, to convert this Russian, though an alien enemy, as it were, into an alien friend, and so far to separate him from the acts of his government, as concerns the subject matter of this license. Lord Ellenborough, in the case of *Usparicha* v. *Noble*, 13 East, 332, has delivered himself so forcibly and clearly on that point, and the circumstances of that case in many respects resemble the present so much, that I shall make no apology for stating that judgment at large. [His lordship then stated that case, and read the whole of Lord Ellenborough's judgment thereon], adding, This opinion seems to go all the length of establishing the right of this plaintiff to sue and recover in the present cause, though it is perfectly well known that his lordship has not entirely adhered to the judgment he had formerly given, but that, on the contrary, in the case now in judgment he contrasts it with the opinion he had given in the case that has been cited. The result of the whole is, that we are clearly of opinion (though the reasons of that opinion, I ought to say, are my own only) that as the case appears, the license legalizes the whole transaction, the insurance in question was properly made, and the circumstance that the confiscation of the property was made by the Russian Government, will not affect the plaintiff's right to recover in this action. And therefore the judgment of the Court of King's Bench ought to be reversed, and judgment ought to be given for the plaintiff. I should add, that Mr. Baron Wood, who is prevented from attending by indisposition, concurs in the judgment of the court.[1]

Judgment for the plaintiff.[1]

[1] This case was learnedly argued, the judgment carefully considered, and it has been repeatedly cited and approved. The case of *Usparicha* v. *Noble*, 1811, 13 East, 322, held that a native Spaniard domiciled in Great Britain in time of war between Great Britain and Spain, having been licensed in general terms by the King of Great Britain to ship goods in a neutral vessel to certain points of Spain, such commerce is

WILLIAMS v. MARSHALL.

COMMON PLEAS, 1815.

(6 *Taunton*, 390.)

GIBBS, C. J. I should have been exceedingly glad to find that this license was substantially complied with. The voyage to be performed was illegal without a license: one of the terms on which the license was granted is, that the goods shall be exported on or before the 10th September: these goods were not cleared at the custom house till the 9th of September: the ship had not sailed on the 10th of September. On the 12th she was at Gravesend, but when she weighed it does not appear. Whether she was covered by this license, or not, depends on the question whether she sailed on the 10th. I cannot say, however I may be disposed to favor the plaintiffs, that the clearing at the custom house is an exportation. Considerable light is thrown on the question by the fact, that by the regulations, or at least by the practice of this country, the drawback is not paid till after the passing Gravesend; and therefore upon the interpretation, which has prevailed, of those acts of Parliament which give a drawback, it appears that ships are not considered as having exported till after passing Gravesend; therefore, with every disposition to favor this action, we cannot say that the plaintiffs are entitled to recover.

Rule absolute for a new trial, the defendant admitting the two policies as stated in the declaration.[1]

legalized for all purposes of its due and effectual prosecution, either for the benefit of the party himself or of his correspondents, although residing in the enemy's country. — ED.

[1] A license to trade is not assignable (unless clearly general in its terms and intent) *Feise* v. *Thompson*, 1807, 1 Taunt. 121; *The Acteon*, 1815, 2 Dod. 48; if subject to condition, license is void if condition is not complied with, *Camelo* v. *Britten*, 1820, 4 B. & Ald. 184:

"We have arrived at this conclusion with great reluctance; because it appears that in this case there was no intention to violate the law, and that this was the usual mode of carrying on the trade. We, however, feel ourselves obliged to say that the terms of the license have not been complied with: The consequence of which is, that the plaintiff cannot recover" (per Abbott, C. J.); License to one set of British merchants cannot be used to cover trading by other British merchants, without connecting them together, *Bush* v. *Bell*, 1812, 16 East, 3; importation of more goods than license warrants will not vitiate insurance on goods licensed, *Prischell* v. *Allnut*, 1813, 4 Taunt. 792; *Keir* v. *Andrade*, 1816, 2 Marsh. 196; license as to goods in ship will legalize insurance on ship and competent for British agent of both parties, in whose name insurance was

THE "SEA LION."

SUPREME COURT OF THE UNITED STATES, 1866.

(5 *Wallace*, 630.)

An act of Congress passed during the late rebellion (July 13th, 1861), prohibited all commercial intercourse between the inhabitants of any State which the President might declare in a state of insurrection, and the citizens of the rest of the United States; and enacted that all merchandise coming from such territory into other ports of the United States with the vessel conveying it should be forfeited.

The act provided, however, that "the *President*" might "in *his* discretion *license and permit commercial intercourse*" with any such part of a State the inhabitants of which had been so declared in a state of insurrection, "in such articles, and for such time, and by such persons, as he, in *his* discretion, may think most conducive to the public interest." And that, "such intercourse, so far as by *him* licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the secretary of the treasury."

The President having soon after declared several Southern States, and among them Alabama, in a state of insurrection, and the Secretary of the Treasury having issued a series of commercial regulations on the subject of intercourse with them, Brott, Davis & Shons, a commercial firm of New Orleans, obtained from Mr. G. S. Dennison, special agent of the Treasury Department, and acting Col-

effected, to sue upon the policy in time of war, *Kensington* v. *Ingliss*, 1807, 8 East, 273, 290.

"While it is true that conditions of license must be complied with and that trading may not extend beyond time limited in the license, perils of the sea, absence of laches and fraud will extend for the completion of the voyage the time of the license, *Siffkin* v. *Glover*, 1813, 4 Taunt. 717; *Siffkin* v. *Allnut*, 1813, 1 M.& S. 39; *Freeland* v. *Walker*, 1812, 4 Taunt. 478, (in which Gibbs, J., observed, in the course of the argument, p. 482), that "there had been at least fifty cases in the King's Bench, where the plaintiff had recovered, although the license had expired at the time of loss, and it had never been attempted to put the case upon the point of the license being expired at the time of the capture."

In *Leevin* v. *Cormac*, 1811, 4 Taunt. 483, Sir James Mansfield, C. J., said in speaking of the question of license, p. 486: "The merits of the case have never yet been examined into. The cases decided by Sir W. Scott (*The Goede Hoop*, Edw. Adm. 327; *Johan Pieter*, ib. 354) deserve the greatest attention." Compare the language of the learned chief justice at page 487 of the same case. — ED.

lector of Customs at New Orleans, a paper, dated February 16th, 1863, as follows:

"The United States military and other authorities at New Orleans permit cotton to be received here from beyond the United States military lines, and such cotton is exempt from seizure or confiscation. An *order is in my hands from Major-General Banks approving and directing this policy.* The only condition imposed is that cotton or other produce must not be bought with specie. All cotton or other produce brought hither from the Confederate lines by Brott, Davis & Shons will not be interfered with in any manner, and they can ship it direct to any foreign or domestic port."

This paper was indorsed by Rear-Admiral Farragut, in command of the blockading force on that coast, "*approved.*" The Rear-Admiral had given also the following instructions to his commanders of the Mobile blockade:

"Should any vessel come out of Mobile and deliver itself up as the property of a Union man desiring to go to New Orleans, take possession and send it into New Orleans for an investigation of the facts, and if it be shown to be as represented, the vessel will be considered a legal trader, under the general order permitting all cotton and other produce to come to New Orleans."

With this paper of the collector of New Orleans in their hands, Brott, Davis & Shons had, through their agents in Mobile, seventy-two bales of cotton shipped at that port on the vessel *Sea Lion* to be carried to New Orleans.

The vessel was captured by the blockading fleet off Mobile, and taken to Key West, and there libeled as prize. The district court condemned the property, and an appeal was taken to the Supreme Court.

Mr. Justice Swayne, in delivering the opinion of the court, said as to the question of license:—

"The effect of this paper depends upon the authority under which it was issued. The fifth section of the act of July 13th, 1861, authorized the President to proclaim any State or part of a State in a condition of insurrection, and it declared, that thereupon all commercial intercourse between that territory and the citizens of the rest of the United States, should cease and be unlawful, so long as the condition of hostility should continue, and that all goods and merchandise coming from such territory, into other parts of the United States, and all proceeding to such territory by land or water, and the vessel or vehicle conveying them, or conveying persons to or

from such territory, should be forfeited to the United States: *Provided, however*, 'That the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.'

"There is no other statutory provision bearing upon the subject material to be considered.

"On the 16th day of August, 1861, the President issued his proclamation declaring the inhabitants of the rebel States, including Alabama, to be in a state of insurrection.

"On the 28th of the same month the Secretary of the Treasury, pursuant to the provisions of the act referred to, issued a series of regulations upon the subject of commercial intercourse with those States.

"These regulations continued in force until the 31st of March, 1863, when a new series were issued by the same authority. The former were in force when the alleged license bears date; the latter when the vessel and cargo left Mobile and when they were captured. It is unnecessary to analyze them. It is sufficient to remark that they contain nothing which affords the slightest pretext for issuing such a paper. It is in conflict with rules and requirements contained in both of them. It finds no warrant in the statute. The statute prescribes that the President shall license the trade. The only function of the Secretary was to establish the rules by which it should be regulated, when thus permitted. The order of General Banks is not produced. If it were as comprehensive as the special agent assumed it to be, it covered shipments to New Orleans from Wilmington, Charleston, and all points in the rebel States. It embraced merchandise, coming alike from places within, and places beyond his military lines. With respect to the latter it was clearly void. The President only could grant such a license. Mobile was then in possession of the enemy. The vessel and cargo bore the stamp of the enemy's property. The paper relied upon was a nullity, and gave them no protection. They were as much liable to capture and condemnation as any other vessel or cargo, leaving a blockaded port and coming within reach of a blockading vessel.

"The decree below was rightly rendered, and it is

"Affirmed."

Mr. Justice Grier: —

"I do not concur in this judgment. The vessel went out of Mobile by permission of the commander of the blockade there. To condemn such property would be a violation of good faith. No English court has ever condemned under such circumstances." [1]

[1] For the theory and practice of the United States in the matter of licensing trade with the enemy and for a résumé of the decisions of courts in this country and in England, see *U. S.* v. *One Hundred Barrels of Cement*, 1862, 27 Fed. Cas. 292 (3 Am. Law Register, 735).

In *Coppell* v. *Hall*, 1868, 7 Wall. 542, the subject was considered and it was held, *inter alia*, that it was for the sovereign's prerogative to allow or disallow trade and to prescribe the manner in which trade, if permitted, might be exercised; that such power, being sovereign in its nature, could only be exercised by the sovereign or his duly authorized agent, and that a military commander, as such, could not arrogate to himself nor exercise such power. In the course of the opinion authorities, English and American, are cited and analyzed.

Perhaps the clearest assertion and application of the sovereign right to regulate trade during war is found in *Hamilton* v. *Dillin*, 1874, 21 Wall. 73. Under the act of July 13, 1861, the President was authorized to permit trade in his "discretion," but that such trade when permitted was to be under rules and regulations prescribed by the Secretary of the Treasury. By virtue of this authority, cotton was permitted to be purchased in an insurrectionary State and shipped to any loyal district upon payment to the government of tax of four cents per pound purchased. One Hamilton secured permits from August, 1863, to July, 1864; purchased and shipped over seven million pounds from Nashville at a time when Tennessee was occupied by the Federal forces. On suit to recover the various sums thus paid, the Supreme Court held that such regulation was binding as flowing from the war power; that Nashville, though within the national military lines in 1863 and 1864, was nevertheless hostile territory, within the prohibition of commercial intercourse, being within the terms of the President's proclamation: that the civil war affected the status of the entire territory of the States declared to be in insurrection except as modified by the declaratory acts of Congress or proclamation of the President. In addition to authorities cited, the case is valuable for an enumeration and examination of the various acts and proclamations affecting trade with the enemy.

In Magoon's Military Occupation, 210–255, the power of the President to regulate trade with the enemy in time of war is elaborately considered, in the course of which it is said (p. 221): "The question of the right of the Federal authorities to thus exercise the war powers of the nation in the matter of trade with the rebellious States was presented to the Supreme Court of the United States in many forms and by many cases. In each instance the court held that business intercourse between the States at war is unlawful without express declaration of the sovereign, the existence of the condition of war being sufficient to create the inability to lawfully engage in trade with public enemies. *United States* v. *Grossmayer*, 9 Wall. 72; *Hanger* v. *Abbott*, 6 Wall. 532; *McKee* v. *United States*, 8 Wall. 163; *Mitchell* v. *United States*, 21 Wall. 350; *Jecker* v. *Montgomery*, 18 How. 110; *The Prize Cases*, 2 Black, 635; *Hamilton* v. *Dillin*, 21 Wall. 73; *The Reform*, 3 Wall. 617; *The Sea Lion*, 5 Wall. 630; *The Ouachita Cotton*, 6 Wall. 521; *Coppell* v. *Hall*, 7 Wall. 542; *Mrs. Alexander's Cotton*, 2 Wall, 404." And the same learned author concludes: "It would therefore seem —

"1. That in a territory rendered hostile by the existence of an insurrection against

KERSHAW v. KELSEY.

Supreme Court of Massachusetts, 1868.

(100 *Massachusetts*, 561.)

A citizen of Massachusetts, residing in Mississippi during the civil war, leased a plantation and planted it with crops; but was driven away by soldiers of the Confederate States, and returned to Massachusetts. The lessor then took charge of the plantation, harvested the crops, and delivered to the lessee's son, in Mississippi, cotton of the value of $10,000. The cotton was shipped to the lessee at Boston by his son. After the close of the war, the lessor sued to recover rent, etc., and the question was, as between lessor and lessee, whether there was trading between enemies.

Judgment. — Gray, J.:[1] —

"The defendant, a citizen of Massachusetts, in February, 1864, in Mississippi, took from the plaintiff, then and ever since a citizen and resident of Mississippi, a lease for one year of a cotton plantation in that state, and therein agreed to pay a rent of ten thousand dollars, half in cash, and half 'out of the first part of the cotton crop, which is to be fitted for market in reasonable time.' The lessor also agreed to deliver, and the lessee to receive and pay the value of the corn then on the plantation. It does not appear whether the defendant went into Mississippi before or after the beginning of the war of the rebellion; and there is no evidence of any intent on the part of either party to violate or evade the laws or oppose or injure the government of the United States. The defendant paid the first instalment of rent, took possession of the plantation and corn, used the corn on the plantation, provided it with supplies to the amount of about five thousand

its authority the United States may exercise the war powers of the nation, known to international law and the laws and usages of war as belligerent rights.

"2. That the payment of customs duties, if considered as taxes levied by a government resulting from military occupation of hostile territory; or as a condition imposed upon the right to trade; as military contributions required from hostile territory; or as a condition imposed upon the right of trade with hostile territory, are each and all legitimate and lawful requirements imposed by exercise of belligerent right.

"3. The military occupier of districts in hostile or enemies' territory is authorized to regulate trade in the districts subject to his occupation, as his discretion, with reference to the military situation, shall determine.

"4. That the President is authorized to exercise the authority to regulate trade with hostile territory in the absence of Congressional provision in regard thereto." — Ed.

[1] Only a few extracts are given from the judgment of the learned judge. — Ed.

dollars, and planted and sowed it, but early in March was driven away by rebel soldiers and never returned to the plantation, except once in April following, after which he came back to Massachusetts. The plaintiff continued to reside on the plantation, raised a crop of cotton there, and delivered it in Mississippi to the defendant's son, by whom it was forwarded in the autumn of the same year to the defendant; and he sold it and retained the profits amounting to nearly ten thousand dollars.

"The plaintiff sues for the unpaid instalment of rent and the value of the corn. The claims made in the other counts of the declaration have been negatived by the special findings of the jury.

"The defendant, in his answer, denied all the plaintiff's allegations; and at the trial contended that the lease, having been made during the civil war, was illegal and void, as well by the principles of international law, as by the terms of the act of Congress of 1861, c. 3, § 5, and the proclamation issued by the President under that act, (declaring all intercourse with states in rebellion unlawful).[1] * * *

"The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or by orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been car-

[1] Gray, J., then reviews the authorities on the subject at great length. The following are the principal cases reviewed: —

The Hoop, 1799, 1 C. Rob. 196; *Bell* v. *Chapman*, 1813, 10 Johns. 183; *Ricord* v. *Bettenham*, 1765, 1 W. Black. 563; *Hutchinson* v. *Brock*, 1814, 11 Mass. 119; *Sparenburg* v. *Bannatyne*, 1797, 1 B. & P. 163; *Potts* v. *Bell*, 1800, 8 Term. R. 548; *Antoine* v. *Morshead*, 1815, 6 Taunt. 237; *Willison* v. *Patterson*, 1817, 1 Moore, 133; *Exposito* v. *Bowden*, 1857, 7 El. & Bl. 763; *Kennett* v. *Chambers*, 1852, 14 How. 38; *Bentzen* v. *Boyle*, 1815, 9 Cr. 191; *Prize Cases*, 1862, 1 Black, 635; *The Rapid*, 1812, 1 Gall. 295; *The Julia*, 1813, 1 Gall 591; *The Emulous*, 1813, 1 Gall. 563; *Brown* v. *U. S.*, 1814, 8 Cr. 110; *The Joseph*, 1813, 1 Gall. 545; *Jecker* v. *Montgomery*, 1855, 18 How. 110; *Hanger* v. *Abbott*, 1867, 6 Wall. 532; *The Ouachita Cotton*, 1867, 6 Wall. 521; *U. S.* v. *Lane*, 1868, 8 Wall. 185; *McKee* v. *U. S.*, 1868, 8 Wall. 163; *Griswold* v. *Waddington*, 1819, 16 Johns. 438; *Mrs. Alexander's Cotton*, 1864, 2 Wall. 404; *Ex parte Boussmaker*, 1806, 13 Ves. Jr. 71; *Coolidge* v. *Inglee*, 1816, 13 Mass. 26; *Paton* v. *Nicholson*, 1818, 3 Wheat. 204; *Musson* v. *Fales*, 1820, 16 Mass. 332; *Capen* v. *Barrows*, 1854, 1 Gray, 380. — Ed.

ried by judicial decision. The more sweeping statements in the text books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.

"The trading or transmission of property or money which is prohibited by international law is from or to one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen. 2. Kent, Com., 63. When a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the amount of the debt, throughout the war, payment then to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offence would be imputable to him, and not to the person paying him the money. (*Conn* v. *Penn.*, Peters, C. C., 496; *Denniston* v. *Imbrie*, 3 Wash. C. C., 396; *Ward* v. *Smith*, 7 Wall., 447; *Buchanan* v. *Curry*, 19 Johns., 137.)

"The same reasons cover an agreement made in the enemy's territory to pay money there, out of funds accruing there, and not agreed to be transmitted from within our own territory; for, as was said by the Supreme Court of New York—the last case cited, 'This rule is founded in public policy, which, forbids, during war, that money or other resources shall be transferred so as to aid or strengthen our enemies. The crime consists in exporting the money or property, or placing it in the power of the enemy.

"The lease now in question was made within the rebel territory where both parties were at the time, and would seem to have contemplated the continued residence of the lessee upon the demised premises throughout the term. No agreement appears to have been made as part of a contract contemporaneously with the lease, that the cotton crop should be transported, or the rent sent back, across the line between the belligerents, and no contract or communication appears to have been made across that line, relating to the lease, the delivery of possession of the premises or of the corn, or the payment of the rent of the one or the value of the other. The subsequent forwarding of the cotton by the defendant's son from Mississippi to Massachusetts may have been unlawful; but that cannot affect the

validity of the agreements contained in the lease. Neither of these agreements involved or contemplated the transmission of money or property, or other communication, between the enemy's territory and our own. We are therefore unanimously of opinion that they did not contravene the law of nations or the public acts of the government, even if the plantation was within the enemy's lines; and that the plaintiff, upon the case reported, is entitled to recover the unpaid rent, and the value of the corn." [1]

SMALL'S ADM'R v. LUMPKIN'S EX'X *et als.*

COURT OF APPEALS OF VIRGINIA, 1877.

(28 *Grattan*, 832.)

BURKS, J. In a foreign or international war, from the time it is declared or recognized, all the people in the territory and subject to the dominion of each belligerent, without regard to their feelings, dispositions or natural relations, become, in legal contemplation, and so continue to the close of hostilities, the enemies of all the people resident in the territory of the other belligerent; and all negotiation, trading, intercourse or communication between them, unless licensed by the government, is unlawful. Such a war, as between the citizens or subjects of the respective belligerents, *ipso facto* dissolves all commercial partnerships and all contracts wholly executory and requiring for their continued existence commercial intercourse or communication; and while it does not abrogate, yet it suspends all other existing contracts and obligations and the remedies thereon, and renders all contracts, with rare exceptions, entered into pending hostilities, illegal and void.

These familiar principles of public law, regulating conduct in foreign wars, have been applied by the courts of this country, State and Federal, to the late war between the United States and the Con-

[1] It is perhaps not too much to say that this is the leading American case on this subject. It has been repeatedly cited and followed: *Brown* v. *Gardner*, 1879, 4 Lea (Tenn.), 145; *Barton Co.* v. *Newell*, 1880, 64 Ga. 699 (case not cited, but same principle involved); *Montgomery* v. *U. S.*, 1872, 15 Wall. 395; *Williams* v. *Paine*, 1897, 169 U. S. 55, 72, where Mr. Justice Peckham, for the court, said: "In the case of *Kershaw* v. *Kelsey*, 100 Mass. 561, the general subject of contracts and business entered into and transacted between the citizens of the different States at war with each other is examined, and the question treated with great care by Mr. Justice Gray in delivering the opinion of the Supreme Judicial Court of Massachusetts, and numerous authorities are referred to and commented upon in the opinion." — ED.

federate States. *Griswold* v. *Waddington*, 16 Johns. R. 438; *Prize Cases*, 2 Black's U. S. R. 635; *Mrs. Alexander's Cotton*, 2 Wall. U. S. R. 404; *The William Bagaley*, 5 Wall. U. S. R. 377; *Hanger* v. *Abbott*, 6 Wall. U. S. R. 532; *Matthews* v. *McStea*, 91 U. S. Rep. (1 Otto), 7; *Billgerry* v. *Branch & Sons*, 19 Gratt. 393; *Walker* v. *Beauchler*, 27 Gratt. 511.

Limited agencies in the enemy's country may lawfully continue, provided they can be and are exercised without intercourse or communication between the citizens or subjects of the contending powers —such as agencies to collect and preserve, but not to transmit money or property. *Buchanan* v. *Curry*, 19 John. R. 136; *Ward* v. *Smith*, 7 Wall. U. S. R. 447; *Manhattan Life Ins. Co.* v. *Warwick*, 20 Gratt. 614; *Hale* v. *Wall*, 22 Gratt. 424; *Mutual Benefit Life Ins. Co.* v. *Atwood's Adm'x*, 24 Gratt. 497; *The N. Y. Life Ins. Co.* v. *Hendren*, id. 536.

Such agencies, however, to be lawful, must, it seems, be created before the war begins, for there is no power, it is said, to appoint any agent for any purpose after hostilities have actually commenced, and that to this effect are all the authorities. *United States* v. *Grossmayer*, 9 Wall. U. S. R. 72; *United States* v. *Lapine*, 17 Wall. U. S. R. 602.

Relying upon the principles recognized by these authorities, the counsel for the appellant contends that the decree complained of in this case is erroneous and should be reversed.

The bill of the appellant was filed against the personal representative and heirs at law of Robert Lumpkin, to recover the amount of a bond alleged to have been given by Lumpkin in his lifetime to the appellant's testator, Thomas B. Small. The defendants answered that the debt was paid. The chancellor was satisfied that the defence was made good by the proofs, and decreed accordingly; and in this, I think, he committed no error. Lumpkin was a citizen of Virginia, and died in 1866. Small, a citizen of Maryland, died there in March, 1861. He left a wife and two sons (minors), entitled under the laws of Maryland to his estate. After the payment of his debts, which were inconsiderable, and two pecuniary legacies given by his will, the estate was worth upwards of sixty thousand dollars. The widow and two other persons qualified in Baltimore as representatives of the estate with the will of the testator annexed. She also qualified there as guardian of the children. The administration of the estate, except the Lumpkin debt, seems to have been conducted exclusively by her co-administrators. The Lumpkin bond was left with her and committed to her sole management.

Some time during the year 1861, the exact date not distinctly ap-

pearing, C. W. Small (the elder of the two sons) came to Virginia and enlisted as a soldier in the Confederate army, and continued in that service until the end of the war. While in Virginia, and during the war, he undertook to collect, and did collect, of Lumpkin, the amount of his bond. The greater part was collected while he was under age. He became of age on the 30th day of December, 1863; and on the 6th day of January, 1864, he collected the remnant of the debt, amounting to $1,875.26. The collections were all made in Confederate currency, taken at its par value. When he made the last collection he executed his covenant to Lumpkin, reciting all the payments made to him, ratifying the collections made while he was a minor, and directing his guardian to charge him with what he had collected as a part of his distributive share of his father's estate, acknowledging the receipt thereof as if the same had been paid to him by the representatives of the estate on account of his interest therein.

When these payments were made, Lumpkin (the debtor) was residing in Virginia, and Mrs. Small, the guardian of her son and representative of her husband's estate, was a resident of Maryland.

In the light of the authorities before cited, it may be conceded, for the purposes of this case, that under the harsh rules of war, the mother and son are to be considered as bearing to each other the unnatural relation of alien enemies; that the occasional correspondence between them, which is proved to have taken place during the conflict of arms then raging, was forbidden and unlawful;[1] and that, pending hostilities, she could confer no valid power upon him, as her agent, to make the collections which he did make. With this concession, however, it by no means follows that the payments made by Lumpkin to C. W. Small were unlawful, and that the obligation of Lumpkin to Small's estate was not discharged.

Lumpkin and C. W. Small were both Confederates, both within the territory and under the dominion of the same belligerent power. They, at least, were not alien enemies to each other, and it was therefore perfectly competent for them to deal and contract as between themselves. They did so deal and contract.

The war being over he returned to Maryland, and there, with his mother and brother, the only parties interested in the estate in the absence of Lumpkin, and without his agency or influence, the whole matter of the Lumpkin debt was satisfactorily arranged and adjusted amongst them. Mrs. Small caused her accounts, as guardian of her two children, to be regularly and formally stated, settled and recorded. The Lumpkin debt was embraced in the settlement, and each of the wards gave her a full acquittance under seal, which was

[1] See last note on next page. — Ed.

also duly recorded. This settlement appears to have been complete and final. The parties were all severally *sui juris*, acted with their eyes open, the facts fresh in their recollection, and with a full knowledge of their rights.

If, therefore, the appellants were permitted to recover the amount of the debt claimed of Lumpkin's estate, it would be with distribution to Mrs. Small and her two sons. It has already been distributed amongst them, as shown by their own recorded admissions. It ought not to be collected and distributed a second time.

Decree affirmed.[1]

[1] *U. S.* v. *Grossmayer*, 1869, 9 Wall. 72, clearly established this principle, which, as seen in the text, is of universal application. A very interesting case to the same effect is *Douglas* (the minor children of Senator Stephen A. Douglas) v. *U. S.*, 1878, 14 Ct. Cl. 1. In the well-considered case of *Rodgers* v. *Bass*, 1877, 46 Tex. 505, 515, it is said: "It cannot be questioned that it is a universally recognized general rule of international law that war suspends for the time all friendly intercourse between citizens of hostile States; that while it continues no kind of business or commercial intercourse can be legitimately transacted or carried on by citizens of the one with those of the other, unless specially authorized by government; and so general and pervading is this principle, that war is held to dissolve *ipso facto* commercial partnerships existing at the breaking out of hostilities between citizens of States at war with each other, and to revoke or supersede authority of agents in regard to transactions not agreed upon and in part executed, and especially such as confer authority to buy and sell property. But, nevertheless, it seems to be equally well settled that war does not revoke or suspend authority for the collection of a debt, given previously to the beginning of hostilities, by a citizen of one of the hostile States to an agent, who, as well as the debtor, resides in the other. *Clarke* v. *Morey*, 10 Johns., 73; *Paul* v. *Christie*, 4 H. & McH. 161; *Dennison* v. *Imbrie*, 3 Wash. C. C. 396; *Mouseaux* v. *Urquhart*, 19 La. 485; *Griswold* v. *Waddington*, 15 Johns. 64; *Buchanan* v. *Curry*, 19 id. 137; *Conn.* v. *Penn.* 1 Pet. 496; *Word* v. *Smith*, 7 Wall. 44; *Fisher* v. *Krutz*, 9 Kan. 501; *Grover* v. *Carter*, 3 Hawk. 328, and cases previously cited." The court likewise holds that payment might be made in Confederate currency. See, also, *Filor's Case*, 1867, 3 Ct. Cl. 25.

In *Shacklett* v. *Polk*, 1875, 51 Miss. 378, 391, it is said (citing numerous authorities): "To show the rigor of the principle of strict non-intercourse, and for its application in various circumstances, we refer to *Hoare* v. *Allen*, 2 Dall. 102; *Brown* v. *Hiatts*, 15 Wall. 177; *Potts* v. *Bell*, 8 Term. 548; *Antoine* v. *Morshead*, 6 Taunt. 237; *The Rapid*, 8 Cranch, 155; *Coppell* v. *Hall*, 7 Wall. 544; *United States* v. *Grossmayer*, 9 id. 74."

It may not be without interest to note that a friendly letter written by Mr. Caleb Cushing to Mr. Jefferson Davis, after outbreak of the Civil War, — both having been members of President Peirce's Cabinet, — prevented Cushing's confirmation as Chief Justice of the United States in 1874 (7 Richardson, Messages and Papers, 259). — ED.

DE JARNETT *et al.* v. DE GIVERSVILLE *et al.*

SUPREME COURT OF MISSOURI, 1874.

(56 *Missouri*, 440.)

WAGNER, Judge, delivered the opinion of the court.

In this case, the petition sets out a purchase by the plaintiffs from the defendants, in the year 1857, of certain real estate in the City of St. Louis, and the giving of notes for the consideration, secured by deed of trust, payable in one, two, three and four years, the last becoming payable on the 30th of April, 1861; a failure to pay the last note, and a sale by the trustee in consequence on the 9th of June, 1861, after publication of notice as required by the deed of trust. It was alleged, that all the notes were paid except that which matured on the 30th of April, 1861, and that the plaintiffs were ready and willing to pay this also, but were prevented by a state of war existing at that time, between the United States of America, of which Missouri was a part, and the Confederate States, of which Virginia was a part; and that the plaintiffs were, in 1857 and in 1861, and during the whole of the war which followed, citizens and residents of the county of Caroline, Va. By reason of the war existing, it was alleged, the notice and sale under the deed of trust were fraudulent and void. It was averred, that as soon as peace was restored, the plaintiffs tendered to the purchaser of the land the amount due under the deed of trust, which was refused, and they prayed that the deed made by the trustees under the sale of June 9, 1861, be set aside and annulled. To this petition the defendants demurred, assigning for causes of demurrer, that the petition showed no cause of action; that it appeared that at the time the default was made there was no suspension of intercourse between the citizens of Virginia and those of Missouri, and that even when the sale was made under the deed of trust, there was no such suspension, and that there was no excuse for the non-payment of the note of the plaintiffs. The court below overruled the demurrer and gave judgment for the plaintiffs, and the case is brought up for review on writ of error.

Whether there was any real or actual suspension of the relations theretofore existing prior to the act of Congress of July 12, 1861, empowering the President to prohibit, by proclamation, all commercial intercourse between the rebellious and the loyal States, and the proclamation of the President in pursuance thereof, issued August 16, 1861, I will not stop to inquire. The case has been argued here

upon the theory that, at the time the sale took place, Virginia had passed her ordinance of secession, and was out of the Union, and was among the number waging war against the general government. If so, her citizens were entitled to belligerent rights, and were clothed with all the characteristics of alien enemies.

Since the decisions in the Supreme Court of the United States in the cases of the *Venice*, 2 Wall. 258; *Mrs. Alexander's Cotton*, 2 Wall. 404; *Mauran* v. *Insurance Company*, 6 Wall. 1; *Ouachita Cotton*, 6 Wall. 521; *Hanger* v. *Abbott*, 6 Wall. 532; *Coppell* v. *Hall*, 7 Wall. 542; *McKee* v. *United States*, 8 Wall. 163; *United States* v. *Grossmayer*, 9 Wall. 72, the question must be regarded as settled, that the late war between the Confederate States and the United States was a public war; and a war, not only between the respective governments, but between all the inhabitants of the one territory, on the one side, and all the inhabitants of the other territory on the other side, so that all the people of each occupied the respective positions of enemies during the continuance of the war.

The consequence of a state of war is the interruption and interdiction of all commercial intercourse, correspondence and dealing between the subjects of the hostile countries. Kent says the interdiction flows necessarily from the principle that a state of war puts all the members of the two nations, respectively, in hostility to each other, and to suffer individuals to carry on a friendly and commercial intercourse while the two governments were at war, would be placing the act of government and the acts of individuals in contradiction to each other. 1 Kent's Com. 66.

As a corollary of this doctrine the principle is well established that an alien enemy cannot sue a friendly citizen in the courts of the latter's country. Bac. Abr. Alien, D.; *Alcinous* v. *Nigreu*, 4 El. and Bl. 217; *DeWahl* v. *Braune*, 1 H. & N. 178; *Whelan* v. *Cook*, 29 Md. 1; *U. S.* v. *1756 Shares of Stock*, 5 Blatch. 231. His disability is temporary in its nature, and personal, and founded upon reason and policy, and in a great measure upon necessity. But no such reason or policy forbids judicial proceedings against an alien enemy in favor of a friendly citizen, and the rule is therefore settled that while an alien enemy may not sue, he may be sued at law.

The question has frequently been brought up in our courts in regard to matters arising out of the late rebellion, and the adjudications in the courts of last resort have all been in accordance with the principles above announced.

In *Mixer* v. *Sibley*, 53 Ill. 61, it was decided that when a party residing in the State of Illinois, holding a promissory note against a person residing in one of the States in rebellion, in the year 1862,

after the act of Congress and the President's proclamation prohibiting commercial intercourse between the adhering States and those in rebellion, commenced a suit thereon by attachment, which was levied on real estate situated in that State belonging to the maker, and obtained a judgment, and procured a sale to be made of the premises attached, that the court had jurisdiction of the cause, and the judgment and proceedings thereunder were valid and binding, notwithstanding the defendant resided in one of the rebellious States, and the war at the time was in active progress.

In the case of *Dorsey* v. *Kyle*, 30 Md. 512, the court holds that a person who, by his own voluntary act, assumed the attitude of an alien enemy to his State, and to the Government of the United States, going from Maryland to Virginia during the late civil war, allying himself with the Southern cause and joining the Confederate army, cannot claim exemption from process of attachment in behalf of antecedent creditors against his property remaining in the State, on the ground that he was an alien enemy, and that all legal remedies were suspended during the period of hostilities. It is emphatically declared that neither reason nor policy forbids judicial proceedings against an alien enemy in favor of a friendly citizen, and therefore while an alien enemy may not sue he may be sued at law. The same question again arose in *Dorsey* v. *Dorsey*, id. 522, and the same principle was again asserted and re-affirmed.

The same conclusion was arrived at in the case of *Thomas* v. *Mahone*, in the Court of Appeals of Kentucky, 12 Am. Law Reg., N. S. 433. There the civil code of Kentucky authorized the creditors of a citizen who departed from the county of his residence and remained absent thirty days within the Confederate lines, to attach his property and sell the same for the payment of their debts. The plaintiff left his home and joined the Confederate service, and while so absent attachments were procured and his property sold, and the court held that the fact that the debtor was a soldier in the Confederate army would not deprive the court of jurisdiction under the code. Lindsay, J., in delivering the opinion of the court, pointedly remarks: "It does not follow, because appellant was at the time a soldier in the army of the belligerent power, and that all unlicensed communication with him by the people of the States adhering to the Federal Union was inhibited, not only by the laws of war, but by express statute, that resident creditors might not sue him in the courts of this State, and subject to the judgment of their debts such of his property as might be found within the local jurisdiction of the courts in which he was sued. The right of resident creditors so to proceed against parties indebted to them, residing within the lines of

the hostile power, and held to be public enemies by reason of their participation in the Southern movement, was recognized by the Federal Congress in the act of March 3, 1863, 2 Brightley's Digest, 1238, providing for the seizure and confiscation of the property of such persons."

In *Crutcher* v. *Hord and wife*, 4 Bush, 363, the same court held that a proceeding by a Kentucky creditor to enforce his lien on land situated in that State was not interdicted, notwithstanding the existence of the war and the residence of the debtors within the Confederate lines. The Supreme Court of the United States in the case of *McVeigh* v. *the United States*,[1] 11 Wall. 259; after citing *Albretcht* v. *Sussmann*, 2 Ves. and Bea. 324; Bacon's Abridgment and Story's Equity Pl., § 53, for authority, says: "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued."

It is contended that the case of *Dean* v. *Nelson*, 10 Wall. 158, asserts a contrary doctrine. That case was a proceeding within an insurrectionary district, but held by the national military forces, in a court established by military orders alone. It was a proceeding to foreclose a mortgage on personal property, and it was instituted against parties who had been expelled by military force from their residence, and who were forbidden absolutely by the order which expelled them from coming back again within the lines of the military authority which organized the court. They were not voluntarily within the Confederate lines, but were sent there against their will, and inasmuch as without their consent and against their will they were thus driven from their homes and forbidden to return by the arbitrary act of the military power, it was held that a judicial decree by which their property was sold during the continuance in force of this order was void as to them.

[1] "It was likewise held in this case that the right to be sued involved the right to appear in the suit, and that, inasmuch as the court refused McVeigh's appearance by counsel, the judgment of the lower court was reversed. In the case of *Clarke* v. *Morey*, 1813, 10 Johns. 69, so often cited in the text, it was held by Kent, C. J., that aliens residing in the United States at the time of war breaking out between their own country and the United States, or who come to reside in the United States after the breaking out of war, under an express or implied permission, may sue and be sued as in time of peace; that it is not necessary, for this purpose, that such aliens should have letters of safe conduct, or actual license to remain in the United States, but that license and protection will be implied from their being suffered to remain, without being ordered out of the United States by the executive. See *Seymour* v. *Bailey*, 1872, 66 Ill. 288, where authorities are collected. Consult *U. S.* v. *One Hundred Barrels of Cement*, 1862, 27 Fed. Cas. 292 (Treat, J.), for an admirable digest of cases on alien enemy.

The United States as a sovereign, independent nation possesses the right and the power to expel aliens on outbreak of war. Rev. St. §§ 4067–4070. — Ed.

But in the subsequent case of *Ludlow* v. *Ramsey*, 11 Wall. 581, it was adjudged that the doctrine of *Dean* v. *Nelson*, that a judicial proceeding on a mortgage carried on within the Union lines against a person driven, by way of retaliation for outrages committed by others, outside of those lines, and prohibited from returning within them, did not apply to a person who went and remained voluntarily in rebellion. Such a person could not complain of legal proceedings regularly prosecuted against him as an absentee.

But there is another aspect in which this case must be considered, and which really presents the principal point, and upon which I would have been satisfied to have placed it had not the counsel for the defendants in error, plaintiffs in the court below, insisted in their briefs that the war produced an entire suspension of all proceedings whatever between the citizens of the respective sides and avoided all judicial process. The sale was made under a deed of trust containing an agreement that in default of payment when the notes matured, the trustee, upon giving the requisite notice, should proceed to sell the property to satisfy the debt. It contained a power coupled with an interest, which was irrevocable in its character, and when the contingency arose calling forth its execution, the trustee was authorized to execute it regardless of the status of the grantors at the particular time. So far as the authority of the trustee was concerned to go on and make a sale of the property in satisfaction of the debt, it made no difference whether the grantors were in the Confederate lines or in the jungles of India, or even if they were dead. It may be conceded that they were in a place or in a condition where it was physically impossible for notice to reach them, but that would not alter the case, as the notice was not designed to be given for their benefit in the sense of notice to them. It was intended to notify the community that the sale would take place in order that bidders might be present to purchase the property.

In the case of *Beatie* v. *Butler*, 21 Mo. 313, it appears that Beatie borrowed a certain sum of money, and, to secure its payment, he executed a mortgage, on real estate, containing a power of sale. Before the note was paid off Beatie died, and after his death the mortgagee sold the property. Neither the widow nor children of Beatie were notified of the sale. Afterwards they moved to set aside the sale, but the court denied the motion, holding that the death of the mortgagor did not extinguish or suspend the power of sale in the mortgage. Scott, J., in writing the opinion of the court, says: "The argument that the death of Beatie should have suspended all proceedings under the mortgage, in analogy to the suspension of all process of execution under the administration law against the estate

of defendants, cannot be maintained. The law may suspend its own process. As it gives the process, it may regulate it. But deeds of trust, and mortgages with a power of sale, arise from the consent and agreement of parties, and there is no propriety in depriving creditors of the fruits of their foresight and caution. The statute of the 25th of January, 1847, is an answer to the argument. That statute, notwithstanding the death of the grantor, in a deed of trust, recognizes a right of sale in the trustee, though it is postponed for nine months after the death of the maker of the deed.

The precise question now under consideration arose in *Harper* v. *Ely*, 56 Ill. 179, where the court decided that the remedy of the holder of a mortgage in that State to make sale of the mortgaged premises in case of default, under a power in the mortgage, was in nowise impaired or suspended during the existence of hostilities in the late war of the rebellion, on account of the residence of the mortgagor and his grantee, subsequent to the mortgage, within the rebellious States; and that the rule applied as well to the grantee of the mortgagor, who always resided within one of the States, which, after conveyance to him, joined in the rebellion, as to the mortgagor himself, who, after making the mortgage, left his residence in one of the loyal States for the purpose of engaging in hostilities against the government.

The very recent decision of the Supreme Court of the United States, in *Washington University* v. *Finch*, 18 Wall. 106, is in point. In that case the facts are that Daly and Chambers purchased of W. G. Eliot in March, 1860, certain real estate in the City of St. Louis, and gave a deed of trust to secure the purchase money. In this deed Ranlett was trustee. The purchasers were citizens and residents of Virginia. Ranlett, as trustee, advertised and sold the premises in December, 1862, after the establishment of non-intercourse between the government and Confederate States. The United States Circuit Court declared the sale to be unlawful because of this non-intercourse, and set aside the deed made by the trustee. The Supreme Court unanimously reversed the judgment, and directed the Circuit Court to dismiss the bill. Mr. Justice Miller, who wrote the opinion, in commenting upon *Dean* v. *Nelson*, *supra*, said that the court had "never decided nor intentionally given expression to the idea that the property of citizens of the rebel States, located in the loyal States, was, by the mere existence of the war, exempt from judicial process for debts due to citizens in the loyal States contracted before the war." Upon the merits of the immediate case under consideration, the learned judge remarked: "The debt was due and unpaid. The obligation which the trustee had assumed on a condition had

become absolute by the presence of that condition. If the complainants had been dead, the sale would not have been void, for that reason, if made after the nine months during which a statute of Missouri suspends the right to sell in such cases. If they had been in Japan, it would have been no legal reason for delay. The power under which the sale was made was irrevocable. The creditor had both a legal and a moral right to have the power, made for his benefit, executed. The enforced absence of the complainants, if it be conceded that it was enforced, does not, in our judgment, afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed on him before the war began. * * * The interest of the complainants in the land might have been liable to confiscation by the government; yet we are told that this right of the creditor could not be enforced, nor the power of the trustee lawfully exercised. No authority in this country, or any other, is shown us for this proposition. It rests upon inference from the general doctrine of absolute non-intercourse between citizens of States which are in a state of public war with each other, but no case has been cited of this kind even in such a war.

"It is said that the power to sell in the deed of trust required a notice of the sale in a newspaper; that this notice was intended to apprise the complainants of the time and place of sale, and that, as it was impossible for such notice to reach the complainants, no sale could be made. If this reasoning were sound, the grantors in such a deed need only go to a place where the newspapers could not reach them, to delay the sale indefinitely, or defeat it altogether. But the notice is not for the benefit of the grantor in the sense of notice to him. It is only for his benefit, by giving notoriety and publicity of the time, terms and place of sale, and of the property to be sold, that bidders may be invited, competition encouraged, and a fair price obtained for the property. As to the grantor, he is presumed to know that he is in default, and his property liable to sale at any time, and no notice to him is required. * * * We are of the opinion that the sale by the trustee in the case under consideration was a lawful and valid sale, and that complainants' bill should have been dismissed."

This argument, it seems to me, is unanswerable, and is so remarkably clear and satisfactory, that nothing remains to be added. The judgment should be reversed, and the petition dismissed. Judges Vories and Sherwood concur; Judges Napton and Adams dissent.[1]

[1] See, also, on this subject the case of *Haymond* v. *Camden*, 1883, 22 West Va. 180, in which authorities are cited at length and discussed. — Ed.

FURTADO v. RODGERS.

COMMON PLEAS, 1802.

(3 *Bos. & Pull.* 191.)

This was the case of the ship *Petronelli*, which sailed from Bayonne in France, Oct., 1792, for Martinique insured in an English company, the policy dating 19th Oct., 1792. The next year, while still at Martinique the war between France and England broke out; and the island of Martinique with all the shipping in the harbors was captured by the English. After the peace of Amiens in 1802, the owner of the ship brought suit in Common Pleas in England, to recover the insurance on the ship.

Judgment,—Lord ALVANLEY, C. J.:—

"As it is of infinite importance to the parties that this case should be decided as speedily as possible, and as we entertain no doubts upon the subject, we think it right to deliver the judgment of the court without any further delay; at the same time considering the magnitude of the question we shall allow the parties to convert this case into a special verdict, in order that the opinion of the highest court in this kingdom may be taken, if it should be thought necessary. There are two questions for our consideration: 1st, whether it be lawful for a British subject to insure an enemy from the effect of capture made by his own government? 2dly, whether, if that be legal, the insurance in this case having been made previous to the commencement of hostilities will make any difference? As to the first point, it has been understood for some years to have been the opinion of all Westminster-Hall, and I believe of the nation at large, that such insurances are not strictly legal or capable of being enforced in a court of justice.

"The cases upon the subject are all brought into a small compass in the two valuable books of Mr. Park and my Brother Marshall. Mr. Park seems to consider the cases of *Brandon* v. *Nesbitt* and *Bristow* v. *Towers* as having decided the point; but after looking very accurately into all the cases, I am ready to admit that there is no direct determination. The above two cases proceeded on the short ground of alienage, which was sufficient to support the decision of the Court without entering into the other question; and I do not think the latter words of Lord Kenyon in *Brandon* v. *Nesbitt*, applied as they are to the case of *Ricord* v. *Bettenham*, support the inference which has been drawn by my Brother Marshall, the

Law of Insurance, pp. 37, 600, viz., that his Lordship thought that a policy effected previous to the war might be sued upon in the event of peace, even though the loss sustained by the assured arose from British capture. It is well known that for a considerable time, not only some politicians entertained an opinion that insurances on enemy's property was beneficial, but that a great Judge went so far as to try causes in which this point directly appeared, and permitted foreigners in their own names, and for their own benefit during the war, to recover on policies of insurance on foreign goods against British capture. The opinion of that learned Judge, as to the policy of such insurances, is well known, and it was supposed he would not have sanctioned them unless his opinion in point of law had been equally favorable. But we have now the best evidence that his sentiments in that respect were different from what they were supposed to be. Though he did try causes upon such insurances, he always entertained doubts upon the law, and endeavored to keep out of sight a question which might oblige him to decide against what he thought for the benefit of the country. This takes off materially from the effect of those cases which have been cited, to induce a supposition that the law of England had tolerated such insurances. How far it is consistent with good faith, after so long an acquiescence, to set up a defence which the foreigner may say he had no reason to expect, is a question for the decision of defendant and not that of the Court. We can only say, that although many persons have recovered in such actions it is equally true that doubts have been entertained by many persons as to their right to recover, and that most of those who were informed upon the subject were firmly persuaded that the objection might have been made with success. This affords a sufficient vindication to the courts of this country in now deciding this point against a foreigner.

"In 1748 an act, 21 Geo. 2, c. 4, passed prohibiting the insurance of French ships and goods during the war; this was at least a legislative declaration of the impolicy of such insurances at that time. From the expiration of that act to the passing of the 33 Geo. 3, c. 27, s. 4, no legislative interference upon the subject ever took place, and previous to the last mentioned act the policy in question was effected. By the terms of the policy, the underwriters certainly undertake to indemnify the plaintiff against all captures and detentions of princes, without any exception in respect of the acts of the government of their own nation. The question then is, whether the law does not make that exception, and whether it be competent to an English underwriter to indemnify persons who may be engaged in war with his own sovereign against the consequences of that war?

We are all of opinion, that on the principles of the English law, it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by an act of parliament. It is admitted that if a man contract to do a thing which is afterwards prohibited by act of parliament, he is not bound by his contract. This was expressly laid down in *Brewster* v. *Kitchell*, 1 Salk., 198. And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract. With respect to the expediency of these insurances, it seems only necessary to cite a single line from Bynkershoek (Quaes. Juris. Pub. lib. 1, c. 21) and part of a passage from Valin, p. 32. The former says, '*Hostium pericula in se suscipere quid est aliud quam eorum commercia maritima promovere*,' and the latter, speaking of the conduct of the English during the war of 1756, who permitted these insurances, says, 'The consequence was, that one part of that nation restored to us by the effect of insurance, what the other took from us by the rights of war.' Lord Hardwicke indeed, in *Henckle* v. *The Royal Exchange Assurance Company*, 1 Ves., 320, uses these words: 'No determination has been that insurance on enemies' ships during the war is unlawful; it might be going too far to say all trading with enemies is unlawful, for that general doctrine would go a great way, even where only English goods are exported, and none of the enemies' imported, which may be very beneficial. I do not go on a foundation of that kind, and there have been several insurances of this sort during the war which a determination upon that point might hurt.' This however is but a doubtful opinion as to the legality of such insurances, and not very favorable to them. In *Plancke* v. *Fletcher*, Lord Mansfield is certainly reported to have said, 'It is indifferent whether the goods were English or French, the risk insured extends to all captures,' which seems at first to go a great way towards giving effect to insurances against British capture. But we must suppose this to have been said because the defendant did not press the objection; and if the party acquiesced, the expression gives no more weight to the case than belongs to any of the other cases which have been cited, such as *Bermon* v. *Woodbridge*, *Eden* v. *Parkinson*, and *Tyson* v. *Gurney*, in which the question was not raised at all. On the other hand, the cases of *Brandon* v. *Nesbitt* and *Bristow* v. *Towers* certainly proceed on the ground of alienage. There is no express declaration therefore of the Court of King's Bench, either for or against the legality of such insurances, and the question comes now to be decided for the first time. We are all of opinion that to

insure enemies' property was at the common law illegal, for the reasons given by the two foreign jurists (Bynkershoek and Valin) to whom I have referred. If this be so, a contract of this kind entered into previous to the commencement of hostilities must be equally unavailing in a court of law, since it is equally injurious to the interests of the country; for if such a contract could be supported, a foreigner might insure previous to the war against all the evils incident to war. But it is said that the action is suspended, and that the indemnity comes so late that it does not strengthen the resources of the enemy during the war. The enemy however is very little injured by captures for which he is sure at some period or other to be repaid by the underwriter. Since the case of *Bell* v. *Potts*, it has been universally understood that all commercial intercourse with the enemy is to be considered as illegal at common law [though previous to that case a very learned judge (Mr. Justice BULLER, in *Bell* v. *Gitson*, 1 Bos. & Pull., 345) appears to have entertained doubts on that subject], and that consequently all insurances founded on such intercourse are also illegal. Why are they illegal? Because they are in contravention of his Majesty's object in making war, which is by the capture of the enemies' property, and by the prohibition of any beneficial intercourse between them and his own subjects to cripple their commerce. The same reasoning which influenced the Court of King's Bench in their decision in Bell against Potts, seems decisive in the present case. For it being determined that during war all commercial intercourse with the enemy is illegal at common law, it follows that whatever contract tends to protect the enemy's property from the calamities of war, though effected antecedent to the war, is nevertheless illegal. It has been supposed that the doctrine which has prevailed respecting ransom bills tends to favor these insurances; but no action was ever maintained upon a ransom bill in a court of common law until the case of *Ricord* v. *Bettenham*, 3 Bur., 1734; 1 Bl., 563, and I have the authority of Sir Wm. Scott for saying, that in the Admiralty Court the suit was always instituted by the hostage. The case of *Ricord* v. *Bettenham*, however, certainly tended to show that such an action might be maintained in the courts of common law at the suit of an alien enemy. In consequence of this, a similar action was brought in *Cornu* v. *Blackburn* (Doug., 641), and after argument, the Court of King's Bench held that it might be sustained. But in *Anthon* v. *Fisher* (Doug., 649, 650, in notes), the contrary was expressly determined upon a writ of error in the Exchequer Chamber. I forbear to enter into the arguments suggested at the bar in favor of the defendant, that the law will not enforce a contract founded on a transaction detrimental to the public policy

of the state. The ground upon which we decide this case is, that when a British subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country; and that if he had expressly insured against British capture, such a contract would be abrogated by the law of England. With respect to the argument insisted upon by way of answer to the public inconvenience likely to arise from permitting such contracts to be enforced, viz., that all contracts made with an enemy enure to the benefit of the King during the war, and that he may enforce payment of any debt due to an alien enemy from any of his subjects, we think it is not entitled to much weight. Such a course of proceeding never has been adopted; nor is it very probable that it ever will be adopted, as well from the difficulties attending it, as the disinclination to put in force such a prerogative. The plaintiff, I am sorry to say, is not entitled to a return of premium, because the contract was legal at the time the risk commenced, and was a good insurance against all other losses but that arising from capture by the forces of Great Britain.

"Judgment for the defendant."

[1] See, further, the excellent case of *Brandon* v. *Cushing*, 1803, 4 East, 410, in which Ellenborough, C. J., held that an insurance on goods from London to Bayonne in France, shipped on board a neutral ship on account and at the risk of Frenchmen before the declaration of hostilities between Great Britain and France, but exported afterwards, cannot be enforced against the underwriter even after the restoration of peace, to recover a loss by capture of a co-belligerent (though not stated to be an ally) during the war; that every insurance on alien property by a British subject must be understood with this implied exception that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer. Of this case, Mr. Duer says (1 Marine Insurance, 473): "Thus, it was finally determined, that a supervening war between the countries of the assurers and assured, from the time that it occurs, renders a prior insurance illegal and void, precisely for the same reasons that render the contract illegal in its origin, when made during a war." However, in the very recent case of *Driefontein, &c., Mines, Lim.* v. *Janson* [1901], 2 K. B. 419, it was held that the insurance of the plaintiff's property against such a seizure was not against public policy and the action was maintained. The facts were: that gold, the property of a Transvaal mining company, was insured with British underwriters against capture, amongst other risks, during transit from the mines in the Transvaal to the United Kingdom. The gold was seized by the government of the Transvaal, at a time when the Transvaal troops were in the field, and war was imminent, although not declared.

In 15 Harv. Law Rev. 237, the following criticism appears: "Acts done in contemplation of war are, if war ensues, regarded as if done in time of war. *The Jan Frederick*, 5 Rob. 128; *The Boedes Lust*, 5 Rob. 233. The question, then, is whether it is against public policy for an insurance company to insure an alien enemy against seizure of his property by his own government. No decided case covers this. It has been held that insurance of an enemy's subject against capture of his goods by ships of the insurer's government is void. *Furtado* v. *Rodgers*, 3 B. & P. 191; *Gamba* v. *Le*

PERKINS v. ROGERS, 1871.

(35 *Indiana*, 124, 167.)[1]

Buskirk, J. The foregoing authorities clearly establish the following propositions: First, that the war-making power is, by the Constitution, vested in Congress, and that the President has no power to declare war or conclude peace, except as he may be empowered by Congress. Second, that the existence of war and the restoration of peace are to be determined by the political department of the government, and that such determination is binding and conclusive upon the courts, and deprives the courts of the power of hearing proof and determining as a question of fact either that war exists or has ceased to exist. Third, that the courts will take judicial notice of the existence of war or the restoration of peace when proclaimed by the President. Fourth, that the late rebellion did not become a civil war and was not governed by the rules of war, until the 16th of August, 1861, when the President issued his proclamation under and in pursuance of the act of Congress of July 13, 1861. Fifth, that civil war is governed by the same rules as a foreign war, and that the legal consequences are the same. Sixth, that the proclamation of the President placed all the inhabitants of the State of Louisiana in a state of insurrection, made them the enemies of the United States and the inhabitants of the adhering States, and rendered all commercial intercourse unlawful, except such as might be carried on under and by virtue of a special license and permit of the President under the rules and regulations prescribed by the Secretary of the Treasury. Seventh, that all contracts made during the war by belligerents, and not licensed and permitted by the President, were absolutely void. Eighth, that contracts made prior to the war were suspended during the existence

Mesurier, 4 East, 407. The ground of the decisions was that a State could not put the same pressure on its enemy if the enemy knew it could be recouped at the end of the war by subjects of that state. This principle applies with equal if not greater force to insurance on goods seized by the government of the assured. Payment of such insurance would be relieving the enemy's subject from the pressure put upon him by his own government to carry on the war, and would in effect be paying the enemy's expenses. On principle and authority the case is wrong, though it has the practical advantage of affording relief to commerce." — Ed.

[1] On the question of trading with the enemy across the lines between Louisiana and Indiana during the civil war, Mr. Justice Buskirk delivered an exceedingly elaborate opinion, in which the authorities are considered at length. It digests admirably the doctrines of the previous sections. The part of the opinion printed above concluded the judgment of the learned judge. — Ed.

of such war; that the remedy upon such contracts was suspended until the restoration of peace, when the debt and the remedy revived. Ninth, that during the existence of the war an inhabitant of a State in rebellion had no right to institute or maintain any suit in any court in the adhering States, and that, consequently, the Statute of Limitations did not run against such person during the existence of the war. Tenth, that the only legal effect of the occupation of the City of New Orleans was to authorize the President to exercise the discretionary power vested in him by the proviso to the 5th section of act of Congress of July 13, 1861; that by said act of Congress the President was authorized to license and permit limited commercial intercourse; that such persons as had a license and permit from the President might lawfully trade; that such license and permit did not confer any right beyond that of trading; that no citizen of the State of Louisiana had the lawful right to carry on commercial intercourse without he had a license and permit from the President issued in strict conformity to the rules and regulations prescribed by the Secretary of the Treasury; that such occupation did not restore peace or release the inhabitants thereof from the legal consequences of their alienage and enmity, or give them a personal standing in our courts. Eleventh, that the plaintiff, being an inhabitant of the State of Louisiana during the war, was the enemy of all the inhabitants of Indiana, and consequently had no right during the existence of the war to institute and maintain an action on the contract sued on. Twelfth, that while the courts will take judicial notice that all the inhabitants of the State of Louisiana were in insurrection, they will not take judicial notice that any of such inhabitants maintained a loyal adhesion to the Union and Constitution, or that any part of said State was occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents, or that any particular person had a license or permit from the President to carry on commercial intercourse, but that a party relying upon such facts must allege and prove them. Thirteenth, that while actual hostilities ceased in April, 1865, peace with its legal consequences was not restored until the 20th of August, 1866, when the President issued his proclamation proclaiming that peace existed throughout the land. Fourteenth, that no part of the account sued on was created during the existence of civil war, and when commercial intercourse was unlawful. Fifteenth, that the time that intervened between the 16th of August, 1861, and the 20th of August, 1866, is not to be included in determining whether this action is barred by the statute of limitations, and that excluding such time the action is not barred. Sixteenth, that when a statute of limitations contains no exceptions, and it appears upon the face of the complaint that the action is barred,

the question can be raised by demurrer, but where there are exceptions, the statute must be pleaded, so as to give the plaintiff the opportunity of replying the facts that will bring it within the exception. Seventeenth, the conclusions that we have reached in this case render it unnecessary to examine the question of whether this action was taken out of the operation of the Statute of Limitations by a new promise or acknowledgment, further than to say that when the letter relied on was written, war existed, which rendered the parties enemies, and made all contracts entered into between them absolutely void.

Section 30. — Duty of Subject or Citizen to come home on outbreak of War.

Story, J., in the brig *Joseph*, 1813, 1 Gall. 545, 552: It has been farther argued, that a declaration of war is, in effect, a command to the citizens of the belligerent country abroad at the time to return home, and that the law allows a reasonable time and way to effect it.

I am not aware of any principle of public law which obliges every absent citizen to return to his country, on the breaking out of the war, nor has any authority been produced which countenances the position. It may be admitted, that the sovereign power of the country has a right to require the services of all its citizens, in time of war, and for this purpose may recall them home under penalties for disobedience. But until the sovereign power has promulgated such command, the citizens of the country have a perfect right to pursue their ordinary business and trade in and with all other countries, except that of the enemy. Upon any other supposition all foreign commerce would, during war, be suspended; for if it were the duty of absent citizens to return, it would, upon the same principle, be the duty of those at home to remain there. As to citizens in the hostile country, the declaration of war imports a suspension of all farther commerce with such country, and obliges them to return, unless they would be involved in all the consequences of the hostile character. If they wish to return, they must do it in a manner which does not violate the laws; and their property cannot be removed with safety from the enemy country unless under the sanction of their own government.

But even if the position were generally true, that is contended for, the law would never deem that a reasonable mode of conveying property home which involved it in a noxious trade with the public enemy. That can never be held to be a reasonable mode of returning a ship to the United States which involves her in a traffic forbidden by the laws.

THE "RAPID."

Supreme Court of the United States, 1814.

(8 *Cranch*, 156.)

This was an appeal from the sentence of the circuit court, for the district of Massachusetts.

The material facts in the case were these.

Jabez Harrison, a native American citizen, the claimant and appellant in this case, had purchased a quantity of English goods in England, before the declaration of war by the United States against that country, and deposited them on a small island, belonging to the English, called Indian Island, and situated near the line between Nova Scotia and the United States. Upon the breaking out of the war, Harrison's agents in Boston hired the *Rapid*, a vessel licensed and enrolled for the cod fishery, to proceed to the place of deposit and bring away the goods. The *Rapid* accordingly sailed from Boston, on the 3d of July, 1812, with Harrison, the claimant, on board, proceeded to Eastport, where Harrison was left, and from thence, agreeably to Harrison's orders, to Indian Island, where the cargo in question was taken on board. On the eighth of July, while on his return, she was captured by the Jefferson Privateer, on the high seas, and brought into Salem. The goods, being libeled as prize, and claimed by Harrison as his property, were condemned in the circuit court of Massachusetts to the captors, on the ground that by "trading with the enemy," they had acquired the character of enemies' property.

A claim was also interposed by the United States, on the ground of a violation, by the *Rapid*, of the non-intercourse act. This claim was also rejected. From the decree of the circuit court the United States and Harrison appealed; at the trial before the Supreme Court the government of the United States did not interpose its claim.

The Court dwelt at considerable length upon the general principles of the rule which prohibited trading between enemies; and as there was no question of the observance of this rule in international law, this part of the opinion is omitted. The claimant contended, however, that there was not a trading with the enemy in this case; that on the breaking out of war, every citizen had a right to withdraw property lying in the enemy's country and purchased before the war. Only so much of the opinion as bears upon this point is given.

Judgment,—Johnson, J. :—

"* * * After taking this general view of the principal doctrine on this subject, we will consider the points made in behalf of the claimant in this case, and, 1. Whether this was a trading, in the eye of the prize law, such as will subject the property to capture?

"The force of the argument on this point depends upon the terms made use of. If by *trading*, in prize law, was meant that signification of the term which consists in negotiation or contract, this case would certainly not come under the penalties of the rule. But the object, policy, and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent states. Negotiation or contract has, therefore, no necessary connection with the offence. Intercourse inconsistent with actual hostility, is the offence against which the operation of the rule is directed; and by substituting this definition for that of trading with an enemy, an answer is given to this argument.

"2. Whether, on the breaking out of a war, the citizen has a right to remove to his own country with his property, is a question which we conceive does not arise in this case. This claimaint certainly had not a right to leave the United States, for the purpose of bringing home his property from an enemy's country; much less could he claim it as a right to bring into this country, goods, the importation of which was expressly prohibited. As to the claim for the vessel, it is founded on no pretext whatever; for the undertaking, besides being in violation of two laws of the United States, was altogether voluntary and inexcusable. With regard to the importations from Great Britain about this time, it is well known that the forfeiture was released on grounds of policy and a supposed obligation induced by the assurances which had been held out by the American chargé d'affaires in England. But this claimant could allege no such excuse.

"3. On the third point, we are of opinion that the foregoing observations furnish a sufficient answer.

"If the right to capture property thus offending, grows out of a state of war, it is enough to support the condemnation in this case, that the act of Congress should produce a state of war, and that the commission of the privateer should authorize the capture of any property that shall assume the belligerent character.

"Such a character we are of opinion this vessel and cargo took upon herself; or at least, she is deprived of the right to prove herself otherwise.

"We are aware that there may exist considerable hardship in this case; the owners, both of vessel and cargo, may have been unconscious that they were violating the duties which a state of war im-

posed upon them. It does not appear that they meant a daring violation either of the laws or belligerent rights of their country. But it is the unenvied province of this court to be directed by the head, and not by the heart. In deciding upon principles that must define the rights and duties of the citizen and direct the future decisions of justice, no latitude is left for the exercise of feeling."

THE "ST. LAWRENCE."

Supreme Court of the United States, 1814–1815.

(8 *Cranch*, 434, *and* 9 *Cranch*, 120.)

This was an appeal from the sentence of the United States Circuit Court for the district of New Hampshire.

The ship *St. Lawrence* was captured on the 20th of June, 1813, and, with her cargo, libeled as prize, in the District Court of New Hampshire. On the 5th of May, 1813, a license was granted by the privy council of Great Britain to Thomas White of London, and others, permitting them to export, direct to the United States, an enumerated cargo in the St. Lawrence, provided she cleared out before the last day of that month. On the 30th of May, 1813, she sailed from Liverpool for the United States with the cargo specified in the license. Mr. Alexander M'Gregor and his family were passengers on board.

It appeared from the examination of Mr. M'Gregor, that he was born in Scotland, was naturalized in the United States in 1795, had lived, the last seven years, in Liverpool, and was returning in the St. Lawrence, with his family to the United States.

There were several claimants, but only so much of the case is given as refers to the claims of M'Gregor and Penniman.

Webster, for M'Gregor and Penniman, said:

"We contend that a distinction is to be taken between an American citizen, domiciled in England at the breaking out of the war, withdrawing his funds, and an American citizen who goes to England after the declaration of war, for the same purpose. That the former, whether a native or naturalized citizen, has a right (and perhaps it is his duty) to return to the United States with his effects. If he has no such right, why should the law of nations have provided a reasonable time for removing in case of war?

"This rule of the law of nations has been founded upon the necessity of the case, and upon the hardship which would attend the want of such a rule. A citizen of one country may lawfully go to any other

country, in time of peace, and take up his residence there; and it would be very hard if he must suffer by the sudden and unexpected breaking out of a war—an event over which he had no control. A neutral would be permitted to withdraw his funds in such a case; and if we should allow the privilege to neutrals, why should we deny it to our own citizens? 1 Rob., 1, *The Vigilantia* 1; *Bos. and Pul.*, 355, *Bell* v. *Gitson*.

"The case of Escott, cited in *The Hoop*, 1 Rob., 165, 196, may perhaps be thought to make against our claim.

"But the cases are not alike. In that case, Escott *sent* for his property: here M'Gregor came with his.

"A character gained by residence, is lost by non-residence. When M'Gregor ceased to reside in England, his character, if hostile before, no longer continued hostile. That it was not his intention to continue his residence in England, is clearly evidenced by his actual return to the United States with his family.

"With regard to his half of the ship, we contend that if he had a right to return, he had a right to use the means necessary for that purpose—he had a right to purchase a ship for the conveyance of himself and his family. So if it was lawful for him to withdraw his funds, he might lawfully invest those funds in merchandise, if he could not otherwise withdraw them. 4 Rob., 161, 195, *The Madonna delle Gracie*; 3 Rob., 11, 12, *The Indian Chief*; 5 Rob., 248, *The President*; 5 Rob., 84, 90, *The Ocean*; 5 Rob., 60, *The Diana*."

Judgment:—

"It is not the intention, to express any opinion as to the right of an American citizen, on the breaking out of hostilities, to withdraw his property purchased before the war, from an enemy country. Admitting such right to exist, it is necessary that it should be exercised with due diligence, and within a reasonable time after the knowledge of hostilities. To admit a citizen to withdraw property from an enemy country, a long time after the war, under the pretence of its having been purchased before the war, would lead to the most injurious consequences, and hold out strong temptations to every species of fraudulent and illegal traffic with the enemy. To such an unlimited extent we are all satisfied that the right cannot exist. The present shipment was not made until more than eleven months had elapsed after war was declared; and we are all of opinion that it was then too late for the party to make the shipment, so as to exempt him from the penalty attached to an illegal traffic with the enemy. The consequence, is that the property of Mr. Penniman must be condemned.

"And their decision is fatal, also, to the claim of Mr. M'Gregor. Independent, indeed, of the principle, there are many circumstances

in the case unfavorable to the latter gentleman. In the first place, it is not pretended that the goods included in his claim were purchased before the war. In the next place, he was the projector of the present voyage, and became, as to one moiety, the charterer or purchaser of the ship. Nearly all the cargo consisted of goods belonging (as it must now be deemed) exclusively to British merchants. He was, therefore, engaged in an illegal traffic of the most noxious nature; a traffic not only prohibited by the law of war, but by the municipal regulations of his adopted country. His whole property, therefore, embarked in such an enterprise, must alike be inflicted with the taint of forfeiture."

AMORY AND OTHERS v. McGREGOR.

SUPREME COURT OF NEW YORK, 1818.

(15 *Johnson*, 24.)

THOMPSON, C. J., delivered the opinion of the court.[1]

The first question that arises is, whether this shipment was not made contrary to the non-intercourse act, so that the goods were thereby forfeited, and the plaintiff's title gone. If the non-intercourse law was in full force and operation at the time of the shipment, I do not see why the principles which governed the case of *Fontaine* v. *The Phœnix Insurance Company*, 11 Johns. Rep. 293, would not apply. The forfeiture was incurred by the act of putting the goods on board, with intent to import the same into the United States; and, according to the principle adopted in that case, the owner loses his right to the property immediately on the commission of the act which produces the forfeiture. There is, however, a distinction between the two cases. Here the circumstances may warrant the conclusion that the shipment was made, under an impression and belief that the repeal of the orders in council would terminate the differences between the two nations, and that the non-intercourse act would not be enforced. And the subsequent act of the 2d of January, 1813, shows the reasonableness of such opinion by remitting the forfeiture in cases where the shipment was made under such belief. But it has been decided, in the Supreme Court of the United States, that the declaration of war virtually repealed and annulled the non-intercourse act, as between us and Great Britain. In the case of *The Sally*, 8 Cranch, 384, the court say the municipal forfeiture, under the non-intercourse act, was absorbed in the more general operation of the law of war. The property of an enemy seems hardly to be within the purview of merc

[1] Statement of facts omitted, together with last paragraph of the opinion. — ED.

municipal regulations, but is confiscable under the *jus gentium*. If, by the declaration of war, on the 18th of June, 1812, the non-intercourse act ceased to be in force, there was nothing making it unlawful for the plaintiffs to import the goods in question, except the existence of the war itself. The question is then presented as to the right of an American citizen, at the breaking out of war, to withdraw his goods from the enemy's country. Whether these goods were liable to British capture is not the question before us. This branch of the defence is placed on the ground that it was an illegal act, on the part of the plaintiffs, to withdraw these goods; and that, therefore, a court of justice will not enforce any contract growing out of such illegal conduct. That all trading with an enemy is illegal is a general and well-settled rule. The principle is recognized and sanctioned, as well by the common law as by the maritime codes of all the European nations, 8 Term. Rep. 554. It is a wise and salutary rule; but it would require the most direct and controlling authority, to satisfy my mind, that the mere act of withdrawing goods from the enemy's country, at the breaking out of a war, comes within the reason or policy of the rule; and no case has fallen under my observation that has pressed the principle thus far. Several cases, in the Supreme Court of the United States, have been referred to as containing that doctrine; but, on examination, they will not be found to support it. The case of *The Rapid*, 8 Cranch, 155, has been relied on as one of the strongest. But that case was essentially different from the present, and decided upon a very distinct principle. Harrison, the claimant, who was an American citizen, had purchased a quantity of English goods, before the declaration of war, and deposited them on a small island belonging to the English, near the line between the United States and Nova Scotia; and after the declaration of war, he sent a vessel, licensed and enrolled for the cod fishery, and brought the goods away, which, on their return, were captured by an American privateer, and condemned, in the Circuit Court of Massachusetts, for trading with the enemy. On appeal, this sentence was affirmed. Judge Johnson, in delivering the opinion of the court, expressly waives giving any opinion upon the point now under consideration, although in very strong and emphatic language he interdicts all intercourse with the enemy. In a state of war, he says, nation is known to nation only by their armed exterior, each threatening the other with conquest or annihilation. The individuals who compose the belligerent states exist, as to each other, in a state of utter occlusion. In war, every individual of one nation must acknowledge every individual of the other nation as his own enemy. Trading, says he, does not consist in negotiation, or contract, but the object, policy, and spirit of the rule is to cut off all communication, or actual locomotive intercourse,

between individuals of the belligerent states. Contract has no connection with the offence. Intercourse inconsistent with actual hostility is the offence against which the operation of the rule is directed. But, after thus narrowing all intercourse, he says, whether on the breaking out of a war the citizen has a right to remove to his own country, with his property, is not the question before the court. The claimant had no right to leave the United States, for the purpose of bringing home his property from an enemy's country. This was the point on which the decision turned. So, again, in the case of *The St. Lawrence*, 8 Cranch, 434, the court say they do not mean to decide on the right of an American citizen, having funds in England, to withdraw them, after a declaration of war, or as to the latitude which he may be allowed in the exercise of such a right, if it exists. That Judge Story did not mean to be understood as deciding this question, in the case of *The Rapid*, is evident from what fell from him in the case of *The St. Lawrence*, when again before the court, 9 Cranch, 121; he says that it is not the intention of the court to express any opinion, as to the right of an American citizen, on the breaking out of hostilities, to withdraw his property, purchased before the war, from an enemy's country. Admitting such a right to exist, it should be exercised with due diligence, and within a reasonable time after the knowledge of hostilities.

Thus it will be seen that this question never has been decided in the Supreme Court of the United States. And, from the guarded and cautious manner in which that court has reserved itself, upon this particular question, there is reason to conclude that, when it is distinctly presented, it will be considered as not coming within the policy of the rule that renders all trading or intercourse with the enemy illegal.

In *Hallett & Bowne* v. *Jenks*, 3 Cranch, 219, the question before the court involved the inquiry as to what circumstances might excuse a trading without incurring the penalties of the non-intercourse act of 1798. Ch. J. Marshall, in delivering the opinion of the court, observes that, even if an actual and general war had existed between this country and France, and the plaintiff had been driven into a French port, a part of his cargo seized, and he had been permitted to sell the residue, and purchase a new cargo, it would not have been deemed such a traffic with the enemy as would vitiate the policy upon such new cargo. According to this opinion, an actual trading with the enemy may, under some circumstances, be deemed lawful. Independent, however, of this general question, the withdrawing of the goods in question may very fairly be considered as falling within the principle settled by the Supreme Court of the United States, in the case of *The Thomas Gibbons*, 8 Cranch, 421. It was there held that a shipment made, even after a knowledge of the war, may well be

deemed to have been made in consequence of the repeal of the orders in council, if made within so early a period, as would leave a reasonable presumption that the knowledge of that repeal would induce a suspension of hostilities on the part of the United States; and that Congress had acted upon that principle, by the act of the 2d of January, 1813, ch. 149, and fixed the time, 15 Sept., 1812, before which shipments might be reasonably made, upon the faith of that presumtion. The same doctrine is again recognized, and more liberally applied, in the case of *The Mary*, 9 Cranch, 147. The shipment, in the case now before the court, was on the 21st of July, and before the declaration of war was known in England. From this view of the case, and the law applicable to it, we are satisfied that withdrawing the goods, under such circumstances, could not be considered an illegal act.

The next inquiry is, whether anything, afterwards, occurred to exonerate the defendant from responsibility upon the bill of lading; and we cannot perceive that there has. There can be no doubt that the admiralty proceedings against the property at New Providence, after the first release, were by the procurement of the agents of the defendant. The case states that the process was procured by Peter McGregor, who sailed on board the vessel from Liverpool, who was the nephew of the defendant, and represented himself as his agent, on the suggestion in his petition that if the goods were brought into the United States they would be seized as imported contrary to law, and would be lost to the owners and underwriters, who were, as he alleged, British subjects. But, upon claim and answer, put in by the master, the petition was dismissed, and the vessel and cargo again liberated; and the ship being about to sail, she was again stopped by a British armed vessel, by the solicitation and procurement of the same Peter McGregor, and one William Stewart, who was on board the ship and proceeding to New Orleans with her as the agent and consignee of the defendant, they giving the captain of the British ship an indemnity for such seizure. The ship and cargo were then libelled, and claims interposed, by different persons, for different parts of the cargo; and the goods in question were claimed as the property of Maitland & Co. The claimants all alleged that if the goods were transported to New Orleans, they would be seized and forfeited, as imported contrary to law; and, in support of such allegation, produced Mr. Gallatin's letter of the 26th of August, 1812, giving instructions to the collectors on that subject. A decree was then pronounced, ordering the goods to be given up to the claimants, and they were sold, and the proceeds disposed of as has been stated. There is no pretence that the persons who represented themselves to be the agents of the defendant, and who acted as such, were not so in fact; and if so, he must be answerable for their acts. Nor is it pretended

that the goods in question belonged to Maitland & Co. All the representation on that subject was a mere cover to get hold of the property, which it was supposed would be seized and forfeited, if sent on to New Orleans. The goods have, therefore, been lost by the act of the defendant; for if they had gone on, and the non-intercourse act had been considered in force, there can be no doubt that, under the act of the 2d of January, 1813, the forfeiture would have been remitted; for the shipment was made within the time limited by that act, and under circumstances bringing the case expressly within its provisions.

The only remaining question is as to the rule of damages by which the amount of the recovery is to be regulated. This, we think, ought to be the net value of the goods at New Orleans, the port of delivery. That was the rule adopted by this court, in the case of *Watkinson* v. *Laughton*, 8 Johns. Rep. 213. Judgment for the plaintiffs.

CLIFFORD, J., in *The William Bagalay*, 1866, 5 Wall. 377, 408, duty of a citizen when war breaks out, if it be a foreign war, and he is abroad, is to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable and adhere to the regular established government. Domicile in the law of prize becomes an important consideration, because every person is to be considered in such proceedings as belonging to that country where he has his domicile, whatever may be his native or adopted country.

Personal property, except such as is the product of the hostile soil, follows as a general rule the rights of the proprietor; but if suffered to remain in the hostile country after war breaks out, it becomes impressed with the national character of the belligerent where it is situated. Promptitude is therefore justly required of citizens resident in the enemy country, or having personal property there, in changing their domicile, severing those business relations, or disposing of their effects, as matter of duty to their own government, and as tending to weaken the enemy. Presumption of the law of nations is against one who lingers in the enemy's country, and if he continues there for much length of time, without satisfactory explanations, he is liable to be considered as remorant, or guilty of culpable delay, and an enemy.[1]

[1] Reaffirmed in *Gates* v. *Goodloe*, 1879, 101 U. S. 612, 617.

In the case of the *Gray Jacket* (1866), 5 Wall. 370, Mr. Justice Swayne, in giving the opinion of the court, said: "The only qualification of these rules (property coming from the enemy country to be condemned) is that when, upon breaking out of hostilities, or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it."

In the case of *Fifty-two Bales Cotton*, Blatchford's Prize Cases, 664 (1863), the cot-

Section 31. — Ransom Bills and Permissible Trading.

CORNU v. BLACKBURNE.

King's Bench, 1781.

(2 *Douglas*, 640)

This was the case of an English vessel and cargo captured by a French privateer and ransomed and a hostage taken as security; but the privateer was in turn captured by two English frigates and taken into an English port. The ransom bill was concealed, however, by the first captor, and not given up; and the present suit is on the ransom bill. This document is as follows:

"No. 66. Registered the present ransom bill at the Admiralty office, Boulogne, the 25th October, 1779, and delivered in double to Captain Robert Cornu, commanding, the cutter, the *Princesse de Robecq* privateer, of this port, by me underwritten Chief Register. Signed, Merlin. Boulogne —We the underwitten Robert Cornu of Boulogne, commander of the ship the *Princesse de Robecq*, privateer of Boulogne, and Thomas Finchett of Liverpool, master of the ship the *Dolly* of Liverpoole, have agreed as followeth, viz.—That I, Robert Cornu, commander of the said privateer, acknowledge to have ransomed the said ship the *Dolly* of Liverpoole, belonging to John Blackburne, burgher of Liverpoole, burthen 105 tons,

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ton was captured on a flat-boat fastened to a wharf in Texas, and belonged to a citizen of New York, who went to Texas before the war to collect debts due to him. The proceeds had been invested in this cotton, with a view to leave the hostile country after the breaking out of the war.

Mr. Justice Nelson, in the circuit court for southern New York held that "the only pretext for condemnation is that the property in question was enemy's property, which I think is not sustained. It appears to me that the claimant used all diligence to collect his effects, with a view to leave the hostile country, after the breaking out of the war, and is brought fairly within the principle of international law that protects him."

In the case of the *Sarah Starr and Cargo*, 1863, Blatchford, 650, the same judge held that after the breaking out of war, citizens of the loyal States resident in the States in rebellion should be accorded a reasonable time to convert their property into funds which could be conveniently carried, and to withdraw from their business connections in the enemy's country. To the same effect the case of the *John Gilpin*, 1863, Blatchford, 661, in which Nelson, J., overruled the decision of the District Court.

Mr. Justice Nelson would seem to be more lenient in this class of cases than the majority of his colleagues on the supreme bench. In the *Prize Cases*, he dissented from the opinion of the majority, and asserted that there could be no illegal trading with the enemy prior to the proclamation of the President, on the 16th of August, 1861.

See further on the removal of property on the outbreak of war, the case of the *Ocean*, 5 C. Robinson, 90 (1804); and the *President*, 5 C. Robinson, 277 (1804). — Ed.

on the 6th of June, in the year 1780, at the heighth of Edinburgh, going from Lynn to Liverpoole in England, under English colours, and passport of said England, loaded with wheat, for the account of John Blackburne, burgher of Liverpoole; which vessel I have agreed to ransom for the sum of 1300*l.* sterling, to be paid to Mr. Hauffoullier, fitter of the said privateer at Dunkirk; in consideration of which I have set the said vessel at liberty to go to the port of Liverpoole, where she is to be arrived in the time and space of three months, after the expiration of which this present agreement shall not clear her from being taken by any other privateers. For security of which ransom, I have received for hostage on board of the said ship, John Butler, cousin to the captain of the said vessel, desiring all friends and allies to let safely and freely proceed the said vessel to the port of Liverpoole, without any let or molestation, during the said time or course of her voyage; and I, Thomas Finchett, owner of the said ship and merchandizes, have voluntarily submitted to the payment of the said ransom, viz. 1300*l.* sterling; for surety whereof I have delivered up the said John Butler of Liverpoole for hostage, promising not to go against the conditions of this present contract, whereof each of us have a copy by us, which we have signed, with the said hostage. Signed on board the said ship, the 6th of June in the year 1780. And it is further expressly covenanted and agreed, that I the said Thomas Finchett do bind and oblige myself, and engage my vessel and cargo, to pay or cause to be paid to the owners of the said privateer, the full amount of the said ransom, should the said hostage come to die, or to desert, or that the said privateer should perish, or be taken with the hostage on board, *without* which condition the captain of the said privateer would not have consented to the above ransom, which, in all cases whatsoever, shall be well and truly paid.—(Signed) Robert Cornu. Thomas Finchett. John Butler."

Lord MANSFIELD:—"It is sound policy, as well as good morality, to keep faith with an enemy in time of war. This is a contract which arises out of a state of hostility, and is to be governed by the law of nations, and the eternal rules of justice. The additional clause is particularly adapted to this case. There is no pretext to impeach it, on the ground of fraud or extortion. The bill was registered before the French ship sailed, with this clause in it. Nor does any inference arise, from its insertion, that the general law was understood to be otherwise; for it is, also, stipulated, that the death of the hostage shall not vacate the contract, which stipulation the parties must be presumed to have known to be unnecessary, because the decision in *Ricord* v. *Bettenham* was notorious over all Europe. Learned lawyers were written to on that occasion, both in France and Holland, and Mr. Justice BLACKSTONE shewed me several letters he had received from abroad, on the subject. It is said, that, by the law of nations, the recapture puts an end to the ransom bill; and the argument is, that the court of Admiralty decrees salvage for retaking the ransom bill.

"But what are the cases brought to prove this position? None of them were litigated but the last, and, there, no ransom bill was forthcoming. Upon what was salvage given in that case? They seem to have mistaken the nature of salvage. They seem to consider it

as a debt which may be exacted. But no man can be compelled to pay salvage, unless he chooses to have the property back. They have confounded distinct subjects. What is the eighth part of a ransom bill? Can the eighth part of an hostage be claimed as salvage? Could the recaptor make use of the ransom bill?

"Could he bring an action on it in the foreign captain's name? When the owner gets possession of the ransom bill, it may be a different consideration. But the present case is clear on two grounds. 1. The special clause is decisive; and, 2. Independent of that clause, there never has been any capture of the ransom bill.

"The authority from Grotius is very strong on this last ground."

Willes, and Ashhurst, Justices, "of the same opinion."

Buller, Justice, "of the same opinion.—The last ground goes all the length; for the bill was never taken.

"The Postea to be delivered to the plaintiff." [1]

THE "CHARMING NANCY."

Opinion of G. Hay, 1761.

(*Marsden's Admiralty Cases*, 398.)

The ship *Charming Nancy* (whereof James Fanneson now is or lately was master) being taken as prize by the French, was with her cargo ransomed by the master for the sum of £ ; and Francis Burt and one of the crew, whose name is unknown, consented to go as hostages for the payment of the said ransom; in consequence whereof the said ship and cargo were released. The ship afterwards arrived at her destined port, and has there unlivered part of her cargo, but the said ransom has not been paid, and the said hostages still remain prisoners. A suit is intended to be commenced in the Court of Admiralty by the relations of Burt to compel the payment of the said ransom, and thereby procure the release of the hostage, and it is uncertain whether the ship, and that part of the cargo which remains unlivered may be sufficient to answer the said ransom.

[1] The case of *Ricord* v. *Bettenham*, 3 Burrow, 1734 (1762), referred to by Lord Mansfield, was that of a British ship captured and ransomed by a French captor, a hostage—Joseph Bell—being taken. The hostage died in prison; and the present action was subsequently brought on the ransom bill by the captor.

It was objected that, the plaintiff being an alien enemy at the time of the contract, the ransom bill was void, the hostage alone being entitled to bring an action. But the court overruled these objections and gave judgment for the plaintiff.—Ed.

Query.—"Have not Burt's relations a right to bring an action against the master, for the performance of whose contract the hostages became bound, as well [as] against the ship and goods, so that they may, if necessary, proceed against both? And can a warrant on such action be refused? And, as the name of the other hostage is not at present known, may not such action be entered in the name of Burt and company as hostages?"

Answer.—"I do not know any instance of a warrant issuing against the master in such a case. The ship and goods are in the first place answerable for the redemption of a hostage.

"These may be arrested, and the suit may be brought by Burt's relations on behalf of both the hostages, naming the one and describing the other of name at present unknown."

G. Hay, January 24, 1761.

"In the first instance I think you cannot proceed against the master. If the ship and goods will not produce the sum stipulated for the ransom, and you can show that the master fraudulently ransomed, I think he may then be prosecuted on behalf of the hostages."

THE "PATRIXENT."

Opinion of William Wynne, 1781.

(*Marsden's Admiralty Cases*, 398.)

The ship *Patrixent*, Hannibal Lush, master, was taken by an American privateer, and was ransomed for £5,500 sterling, and an hostage delivered, who was carried to America. For the above sum the captain of the ransomed ship drew a bill upon Messrs. John Glassford & Co., merchants in Glasgow, a copy of which is underwritten, who are owners of the vessel.

The ransom-bill was sent to Amsterdam, and from thence remitted to merchants in London, to recover the value of it. When it was first presented to the gentlemen upon whom it was drawn, they offered £1,000, part of it, as the value of the ship; but it not being thought prudent to receive a part of the money, their offer was then refused: since which the said gentlemen, together with the owners of the cargo, have refused to pay the bill or any part of it.

Your opinion is desired whether the holder of this ransom bill can maintain a suit in the Admiralty Court against the owners of the ship and cargo for the recovery of the sum for which such bill was

given? And whether such suit must be brought against every individual owner of the ship and cargo.

COPY OF THE BILL.

"£5,500. On board the schooner *Hanna.*

July 26, 1779.

"At ninety days' sight my second bill of exchange, first and third of the same tenor not paid, pay to Richard Jackson or order the sum of five thousand five hundred pound sterling, for the ransom of the ship *Patrixent* and her cargo.

HANNIBAL LUSH.

"To Messrs. JOHN GLASSFORD & Co.,
"Merchants, Glasgow."

Answer.—"I think that the owner of this ransom-bill may maintain a suit in the Court of Admiralty for the recovery of the sum for which the bill was given; but I apprehend they must make it appear that the hostage is not at liberty, if he is living, before they can obtain payment of the money. The proper way of commencing such a suit would be by arresting the ransomed ship with the cargo on board. But if that cannot be done, I think it will be sufficient to bring the suit against Lush, the master, who drew the bill, and Messrs. Glassford & Co., the owners of the vessel, upon whom it is drawn."

WM. WYNNE, Doctors' Commons, July 25th, 1781.[1]

[1] *Ransom Contracts.*—In a subsequent case, *Anthon* v. *Fisher*, 2 Douglas, 649, note, it was settled in English law that an alien enemy cannot sue on a ransom bill for want of a *persona standi in judicio.*

And so in the case of *The Hoop*, 1 C. Rob. 201, Sir W. Scott said, "Even in the case of ransoms which were contracts, but contracts arising *ex juri belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action by the imprisoned hostage in the courts of his own country, for the recovery of his freedom."

"But the effect of such a contract," says Wheaton, Ed. of 1863, p. 695, "like that of every other which may be lawfully entered into between belligerents, is to suspend the character of an enemy, so far as respects the parties to the ransom bill; and, consequently, the technical objection of the want of a *persona standi in judicio* cannot, on principle, prevent a suit being brought by the captor, directly on the ransom bill." And this appears to be the practice in the maritime courts of the European continent. Valin, Ord. de la Marine, liv. 3, tit. 9, art. 19; 1 Pistoye et Duverdy, 280 *et seq.*

"If the ransomed vessel," says Wheaton, Ed. of 1863, p. 694, "is lost by the perils of the sea, before her arrival, the obligation to pay the sum stipulated for her ransom is not thereby extinguished. * * * Even where it is expressly agreed that the loss of the vessel by these perils shall discharge the captured from the payment of the ran-

GOODRICH & De FOREST v. GORDON.

SUPREME COURT OF NEW YORK, 1818.

(15 *Johnson*, 6.)

In 1813, the defendant, jointly with certain other persons, was owner of the sloop *Hope*, and he authorized one Napier, the master of the sloop, to ransom the vessel in case of capture, for a sum not exceeding two thousand dollars, and bound himself to honor the bill if so drawn upon. During the voyage *The Hope* was captured by the British frigate *Endymion*, and was ransomed by the master pursuant to defendant's instructions for the sum of $2,000, for which amount he drew a bill upon the defendant.

THOMPSON, Ch. J., delivered the opinion of the court. There can be no doubt that the contract for the ransom of the vessel was a lawful contract. Such contracts are sanctioned by the laws of nations, and are not deemed a trading with the enemy, 2 Azuni, 313, nor was the passport given by the captors, upon the ransom, and accepted by the master of the captured vessel, in violation of the act of Congress, 2d August, 1818. It was merely a certificate, given by the captors, to serve as a passport, and protect the ransomed vessel from all other armed vessels belonging to the nation of which the captors were subjects, and to prevent another capture, 2 Azuni, 316. It may, perhaps, come within the exception to the act of Congress (2d sec.) which declares that the act shall not prevent the acceptance of a passport, granted by the commander of any ship of war of the enemy, to any ship or vessel of the United States, which may have been captured and given up, for the purpose of carrying prisoners, captured by the enemy, to the United States. Admitting, however, that the instru-

som, this clause is restrained to the case of a total loss on the high seas, and is not extended to shipwreck or standing, which might afford the master a temptation fraudulently to cast away his vessel, in order to save the most valuable part of the cargo, and avoid the payment of the ransom. * * * So, if the captor, after having ransomed a vessel belonging to the enemy, is himself taken by the enemy, together with the ransom bill, of which he is the bearer, this ransom bill becomes a part of the capture made by the enemy; and the persons of the hostile nation who were debtors of the ransom are thereby discharged from the obligation."

On the subject of ransom generally, see Judge Story's opinion in *Maisonnaire* v. *Keating*, 1815, 2 Gall. 324, 337.

In *Miller* v. *Resolution*, 1781, 2 Dall. 1, 15, it was held that ransom bills are not contracts with the enemy and that they bind not only contracting parties but also their allies.

ment given in the case before us is not the one contemplated by this provision, still, I think, the act does not at all extend to such certificates.

The only question in this case, then, is, whether the defendant is chargeable as an acceptor of this bill. In *Pillans & Rose* v. *Van Mierop & Hopkins*, 3 Burr. 1663, Lord Mansfield, and the whole court go the full length of saying that a promise to accept a bill is equivalent to an acceptance, whether it be before or after the bill is drawn. Lord Mansfield, however, afterwards, in the case of *Pierson* v. *Dunlop*, Cowp. 573, in some measure, limits and qualifies his former doctrine. He observes that it has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, I will duly honor it, is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance; thereby confining the rule to cases where third persons have acted upon the faith of such assurances, and have been induced, in consequence thereof, to take the bill. In *Johnson* v. *Collins*, 1 East, 98, the rule, as laid down in *Pillans* v. *Van Mierop*, is certainly overruled; and, from the observations of the judges, the limitation and qualification, as contained in *Pierson* v. *Dunlop*, is not either sanctioned or approbated; nor am I aware that it has been expressly adopted, in any subsequent decision, in the English courts. But I think it may fairly be inferred, from the observations of the late chief justice, in *McEvers* v. *Mason*, 10 Johns. Rep. 214, that the rule, as laid down in *Pierson* v. *Dunlop*, is approved of by this court. It is there said, every one will agree that an acceptance by a collateral paper may be good; and if that paper be shown to a third person, so as to excite credit, and induce him to advance money on the bill, such third person ought not to suffer by the confidence excited. Whether these observations were intended to apply to collateral acceptances of a bill already drawn, or to be afterwards drawn, does not appear. But I cannot see any sound principle upon which the cases can be distinguished. No question of want of consideration can arise in either case, and it is the credit, which such acceptance or engagement to accept has given to the bill, which gives to it its binding operation. The testimony in the case before us is very full to show that this letter of the defendant, authorizing the drawing of the bill, accompanied it, at all times, and that it was upon the credit of that letter that the bill was taken by the plaintiff. It appears to me to be a gross violation of good faith, in the defendant, now to disclaim the authority of the captain to draw the bill. The letter may well be considered an authority to draw, accompanied by a promise to accept. It was an authority given for the express purpose of enabling the

captain to draw the bill, which was an act done for the benefit of the defendant, and according to his instructions; and I think it binding upon him as an acceptance; and this is the opinion of the court. The plaintiff is, accordingly, entitled to judgment.

Judgment for the plaintiff.[1]

ANTOINE v. MORSHEAD.

COMMON PLEAS, 1815.

(6 *Taunton*, 332).

This was an action upon five bills of exchange, all drawn by the father of the defendant, a British subject, on the 12th of September, 1806, while he was detained a prisoner at Verdun in France during the late war with that country, payable, some to Tyndall, some to Estwicke, both British subjects in like manner detained prisoners there, at one year after date, indorsed to the plaintiff, who was a French subject and a banker at Verdun, and accepted by the defendant. The cause was tried at Guildhall at the sittings after Easter term, 1815, before C. J., when it was contended on the part of the defendant, that it would be treason to pay the bills, by the statute 34 G. 3, c. 9, §§ 1, 4. GIBBS, C. J., refused to hear the objection: he did not know to what extent it might be carried, but if it could be supported to its full extent, many of our miserable fellow-subjects detained in France must have starved. It was also objected, that this being a contract with an alien enemy, was not merely suspended during the war, but absolutely void; the Chief Justice thought otherwise, and the jury found a verdict for the plaintiff.

Vaughan, Serjt., on a former day in this term moved for a rule *nisi* on both these objections, when, it being suggested on the part of the plaintiff, that the statute 34 G. 3, c. 9, had expired at the peace of 1800 and never been re-enacted, the court gave time to ascertain that fact, and that being found to be the case, Vaughan now moved upon the second objection only, namely, that the indorsement of the bill to an alien enemy was void. For this he cited *Anthon* v. *Fisher*, where it is held that no action can be maintained by an alien in the

[1] *Vide Coolidge* v. *Payson*, 2 Wheaton, 66, in which the Supreme Court of the United States decided, "upon a review of the cases which are reported, that a letter written within a reasonable time, before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill, on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

courts of this country on a ransom bill, because it is a right claimed to be acquired by him in actual war. Lord Ashburton's argument in *Ricord* v. *Bettenham*, 3 Burr., 1734, which decision is overruled by *Anthon* v. *Fisher*, is to be called in aid. If a bond be given to an alien enemy, it is good *quoad* the obligor, that is, it enures only for the benefit of the Crown. And if so of a bond, the law must be the like on a bill of exchange. So is it of contracts of insurance made with an alien enemy. *Flindt* v. *Waters*, 15 East., 266, Lord Ellenborough, C. J., says the defense of alien enemy may go to the contract itself, on which the plaintiff sues, and operate as a perpetual bar; though in that case the contracting party having become an enemy after the contract, it was held to be only a temporary suspension of the right to sue, but he showed a disposition to confirm the cases of *Brandon* v. *Nesbitt*, 6 T. R., 23, and *Bristow* v. *Towers*, 6 T. R., 35. No case has decided that a contract made with an alien enemy in time of war may be ever afterwards enforced. Chief Baron Gilbert lays it down, that upon the plea of alien enemy the right of the plaintiff is forfeited to the crown, as a species of reprisal upon the state committing hostility.

Gibbs, C. J.:—"It will not be useless to consider what legal propositions can be deduced from the cases cited on behalf of the defendant, and to try how far they are applicable to the present case. This is no bill of exchange drawn in favour of an alien enemy, but by one subject in favour of another subject, upon a subject resident here, the two first being both detained prisoners in France; the drawer might legally draw such a bill for his subsistence. After the bill is so drawn, the payee indorses it to the plaintiff, then an alien enemy. How was he to avail himself of the bill, except by negotiating it, and to whom could he negotiate it, except to the inhabitants of that country in which he resided? I can recollect but two principles from the cases cited by the counsel for the defendant, and they are principles on which there never was the slightest doubt. First, that a contract made with an alien enemy in time of war and that of such a nature that it endangers the security, or is against the policy of this country, is void. Such are policies of insurance to protect an enemy's trade. Another principle is, that however valid a contract originally may be, if the party become an alien enemy he cannot sue. The Crown, during the war, may lay hands on the debt, and recover it, but if it do not, then, on the return of peace the rights of the contracting alien are restored, and he may himself sue. No other principle is to be deduced. The first may be laid out of the case, for this was not in its creation a contract made with an alien enemy. The second question is, whether the bill came to the hands of the plaintiff

by a good title? Under the circumstances of this case, not meaning to lay down any general rule beyond this case, I am of opinion that the indorsement to the plaintiff conveyed to him a legal title in this bill, on which the king might have sued in the time of the war, and he not having so done, the plaintiff might sue after peace was proclaimed."

Heath, J., was absent.

Chambre, J.—"I am perfectly of the same opinion, and it would be of very mischievous consequence if it were otherwise."

Dallas, J.—"This is not a contract between a subject of this country and an alien enemy, nor is it a contract of that sort to which the principle can be applied. That principle is, that there shall be no communication with the enemy in time of war, but this is a contract between two subjects in an enemy's country, which is perfectly legal.

"Ruled refused."[1]

CRAWFORD *et al.* v. THE "WILLIAM PENN."

United States Circuit Court for Pennsylvania District, 1819.

(3 *Washington, Circuit Court*, 434.)

Washington, Justice, delivered the opinion of the Court:[2] —

Having disposed of these preliminary points, we come to the consideration of the main question, — whether this contract, being made with an enemy, is void?

The general rule is admitted, that contracts made with an alien

[1] Accord, *Daubuz* v. *Morshead*, 1815, 6 Taunt. 332. This was an action upon a bill of exchange for £2,020 drawn by Sir John Morshead, Bart., deceased, at Verdun, where he had during the late war been detained by the French Government, and accepted by the defendant, his son, in favor of Borau Barti, and indorsed to the plaintiff. Upon the trial of the cause, at the sittings at Guildhall after Trinity term, 1815, before Gibbs, C. J., one line of defence taken, and proved, was, that as to all the contents of the bill, except £80, the plaintiff was only a trustee for a alien enemy. Gibbs, C. J., without pronouncing what would become of the money when recovered, and whether the Crown might or might not lay hands on it, thought the plaintiff entitled to recover the whole amount, and the jury accordingly found a verdict for the plaintiff.

Lens, Serjt., now moved to set aside the verdict, and have a new trial, not impugning the direction of the chief justice, but upon an affidavit that the bill was given, as to all, except £80, for a gaming debt; but his affidavit stating only information and belief, and there being evidence that the plaintiff had by letter asked for time, and been indulged for several years, the court refused the rule— Ed.

[2] For facts see next case. Part of opinion omitted. — Ed.

enemy are void. Such is the law of nations, and of most, if not of all, the civilized nations of the world. The English and American decisions are positive in the establishment of this doctrine.

But to this, as to most general rules, there are exceptions. Contracts made with an enemy, under the license of the government, are valid; and may, in certain cases, be enforced even during the war; and that, too, whether the contract arose directly or collaterally out of such licensed trade. So, if the enemy with whom the contract is made be in the hostile country by license of that government. So, a ransom bond, given to an enemy, to procure the discharge of the property and the person of the captured, we hold to be valid. Such was decided to be the law of England, in the case of *Ricard* v. *Bettenham*, 3 Burr. 1734, and in *Cornu* v. *Blackburn*, Dougl. 641. Such, too, is the law of other countries on the continent of Europe. We are aware of the decision in the case of *Anthon* v. *Fisher*, in the Exchequer, which is to the contrary, Dougl. 649, note; but never having met with a full report of the case, it is not easy to understand what were the particular reasons which led to that decision. How far it may have been influenced by the statute making it criminal to give a ransom bond, which had passed prior to this decision, but after the ransom, is not clear. At all events, it was a case decided long after our Declaration of Independence, and even after the treaty of peace; and is therefore not to be considered as authority in the courts of this country, so as to overrule the decision in *Ricard* v. *Bettenham*, which was made in 1765.

There are other cases, which are considered as exceptions, even in England, where the general rule is upheld with considerable rigor, founded upon the peculiar necessity of the case.

The case of the *Madona delle Gracie*, 4 Rob., is, to say the least of it, a very liberal relaxation of the general rule. It would seem, from the modern cases, that contracts made by prisoners of war in the enemy's country have been supported. In the case of *Sparenburgh* v. *Bannatyne*, 1 Bos. & Pul. 163, Chief Justice Eyre observes that "modern civilization has introduced great qualifications to soften the rigors of war, and allows a degree of intercourse with enemies, and particularly with prisoners of war, which can hardly be carried on without the aid of our courts of justice." The other judges agree with him.

Recoveries at *Nisi Prius*, we understand, are common, upon contracts made with the enemy by prisoners of war, upon parol, for their subsistence. *Willison* v. *Patterson*, East. term, 1817, C. P.

The case of *Antoine* v. *Morehead*, 6 Taunt. 237, is that of a bill of exchange drawn on England, in the enemy's country, by one British subject, a prisoner of war, in favor of another British subject, also a

prisoner of war, and by him indorsed to an alien enemy; in which case the contract was supported. It is true that the court seem to rely very much upon the circumstance that the original contract was between British subjects. But it is impossible not to perceive that the right of the alien enemy to recover upon such bill, after the return of peace, was founded upon a new contract with an alien enemy, by virtue of the indorsement; and that, if in all cases a bill drawn by one subject in favor of another, may pass, by indorsement, into the hands of an alien enemy, the general rule of law might be indirectly subverted. We understand this case, therefore, as going the full length of establishing an exception to the general rule, in favor of prisoners of war, in the country of the enemy, contracting for necessaries. Chief Justice Gibbs seems to place it upon this ground; by saying that, "if the objection could be supported, to its full extent, many of our miserable fellow subjects, detained in France, must have starved." The case of *Daubuz* v. *Morshead*, 6 Taunt. 332, is a case like the former, in principle.

The principle on which this doctrine is founded is strongly supported by the decision of the Supreme Court of the United States, in the case of *Hallet and Brown* v. *Jenks*, 3 Cra. 210.[1] That was the case of an insurance upon a cargo, purchased at St. Domingo, by the owner of an American vessel which had been forced into that island by distress, and was compelled by the government to dispose of her outward cargo, with the proceeds of which the cargo insured was purchased. The objection made to the recovery was that the cargo so insured was purchased contrary to the express provisions of the non-intercourse law; and that the trade, being therefore illicit, the policy was void. But the Supreme Court maintained the validity of the contract, upon the ground that the vessel having been forced into the island by a cause which could not be resisted, and the owner having been compelled by the government of the country to dispose of his cargo, it was not a trading contrary to the spirit of the law to invest the proceeds in a return cargo.

Now, that was the case of a trading as expressly prohibited by the municipal laws of the United States, as a trading with the enemy is by the law of nations; and found its justification in a necessity, not imperious and irresistible, but one which was induced by a desire to

[1] This case arose in New York, where it is reported as *Jenks & others* v. *Hallet & Brown*, 1803, 1 Caines' R. 60, and the next year on appeal was unanimously affirmed in the Court of Errors. *Hallet & Brown*, 1804, 1 Caines Cases, 60.

The transaction was likewise affirmed in the United States Supreme Court, as cited in the text. The cases were therefore carefully argued and considered, and may be taken as the mature determination of the respective tribunals. — Ed.

save property. The owner might have avoided a breach of the law, strictly construed, if he had chosen to abandon his property. But the court was of opinion that he was not bound to do so, notwithstanding the strong and unqualified expressions of the law. It is difficult to discover a difference, in principle, between that case and the present. In both, the vessel was forced into a forbidden port by a *vis major* — in both, a voluntary trading was forbidden; and in both, the contract, which would have been void, upon general principles of law, was predicated upon a necessity, no otherwise indispensable than in order to save property. There is, indeed, this difference between the two cases, which, however, is all on the side of the validity of this contract; — in the former, the master might have brought away his vessel and crew, with no other loss than that of the cargo, and that, too, from a nation with which the United States were at peace; whereas in the latter the departure of both depended upon the contract now objected to, and that from the country of the enemy.

We cannot take leave of the case just referred to without citing certain expressions of the chief justice, applicable to a case precisely like the present. He observes that "even if an actual and general war had existed between this country and France, and the plaintiff had been driven into a French port, and a part of his cargo seized, and he had been permitted by the officers of the port to sell the residue, and to purchase a new cargo; I am of opinion that it would not have been deemed such a traffic with the enemy as would vitiate the policy upon such new cargo." Had this hypothetical case been the very case before the court, it would have been directly in point, and would have gone on all fours with the present. It corresponds, however, in principle, so precisely with the main case decided, that the opinion of this learned and highly distinguished judge is entitled to more than ordinary respect.

The ground which the court takes in deciding this case is, that the contract grew out of a real necessity, produced by a state of war, and was itself the offspring of an act of hostility. The vessel was captured as prize of war, libelled as such, and on account of her having a British license on board was acquitted. She was disabled from availing herself of this discharge and returning to her own country with her crew, without being repaired and victualled. This could no otherwise be effected than by hypothecating the vessel for those repairs and outfits. In a moral point of view, therefore, it cannot be said that this was a voluntary contract. The decision in this case can never be relied on to sanction contracts with the enemy, under cover of a pretended necessity, or in which there is the slightest tincture of fraud, upon the general rule of law.

Upon the whole, then, we are of opinion that this bottomry bond is not void on the ground of its being a contract made with the enemy.

The next objection is that this bond is void — because the asserted voyage to the United States to bring home prisoners was a new voyage; and that the master had no authority to take up money on the security of the vessel, unless it had been necessary to enable him to complete his original voyage.

In support of this position the learned counsel referred to no authority which appears to bear upon it; and it is certainly unsupported by reason, or by any general principles of law. The master is the servant of the owner; and from the nature of his station as such he has authority to enter into contracts for the employment of the vessel, as well as such as relate to the means of employing her. His duty is to obey the orders of his owner, and to act with fidelity to him, and with a view to his interest. He appears in this character to the world, where it can never be known, by those who transact business with him, what may be his private instructions. The consequences to commerce would be disastrous, indeed, if the owner whose ship is repaired and fitted to perform a voyage by means of advances made in a foreign port could relieve his property from the security given on it by the master, by asserting and showing that the voyage, for the performance of which she was refitted, was not the real voyage which the master was instructed to perform. In this case the vessel was captured and carried into the enemy's country; and the original voyage to Lisbon was thereby put an end to, by a compulsory sale of the cargo. The vessel was released, but could not leave Jamaica upon any voyage without considerable expense in refitting and victualling her. What was the master to do? He could have her refitted, by agreeing to hypothecate her as a security for the advances; but he is told that he cannot give a valid hypothecation unless he will agree to go to Lisbon, at great expense, and without an object; or will return empty to the United States; although a freight had been offered him sufficient, perhaps, to cover all her expenses and outfits. Is it possible that it can lie in the mouth of the owner, who would alone be the victim of such a doctrine, and is benefited by a rejection of it, to urge this as an objection against the validity of the contract? It can only be necessary to state the case to refute the argument. The truth is that the authority of the master to hypothecate is not restricted to necessaries to enable him to complete his original voyage. It extends to the obtaining of supplies necessary for the safety of the vessel, and to enable him to perform any voyage which he is authorized by law to undertake; there being no collusion between him and the lender to injure the owner. That the master, in this case, was authorized, and that it was his duty to

return to the United States, under any legal contract intended for the advantage of his owners, is indubitable.

Another objection was taken by the respondent's counsel, to the sufficiency of the evidence to prove the debt for which this security was given, which need not be examined until the final hearing of the cause. It may be sufficient, for the present, to observe that the libellant, upon a bottomry bond, is always expected to prove, by evidence other than the bond itself, that the money was lent, or the repairs made and materials furnished, to the amount for which the vessel is liable; — that they were necessary to enable her to perform her voyage, or for her safety, and could no otherwise be obtained, etc. He ought to exhibit an account of those items, with the usual proofs to support them, that the court may judge whether they were necessary for those purposes; because, unless they were, the master exceeded his authority, as such, to bind the property of his owners.

The parties then asked leave to amend the pleadings, which was granted.[1]

CRAWFORD & McCLEAN v. THE "WILLIAM PENN."

United States Circuit Court for Pennsylvania District, 1815.

(*Peters, Circuit Court*, 106.)

This was a libel in the district court, on a hypothecation of this vessel, given at Jamaica, for repairs made on her, and advances for her outfit, to enable her to perform her voyage to the United States. The owner of the ship was admitted to claim; and he pleaded that

[1] In *Scholefield & Taylor* v. *Eichelberger*, 1833, 7 Pet. 586 — a case involving trading with the enemy — Mr. Justice Johnson, speaking for the court, said: "The doctrine at this day is not to be questioned that, during a state of hostility, the citizens of hostile states are incapable of contracting with each other. For nearly twenty years this has been the acknowledged doctrine of this court, and in a case which proves it to be of very general and rigid application (*The Rapid*). Even the exception commonly quoted of ransom bonds has been shown, I think, in the case of *Potts* v. *Bell*, to be no exception; since it grows out of a state of war; is *ex vi termini* a contract between belligerents; and from its nature carries with it the evidence of the fidelity of the parties to their respective governments. To say that the rule is without exception would be assuming too great a latitude. The question has never yet been examined whether a contract for necessaries, or even for money to enable the individual to get home, would not be enforced; and analogies familiar to the law, as well as the influence of the general rule in international law, that the severities of war are to be diminished by all safe and practical means, might be appealed to in support of such an exception. But at present it may be safely affirmed that there is no recognized exception but permission of a state to its own citizens, which is also im-

the instrument of hypothecation was executed during war; and that the libellants are alien enemies, residing in Jamaica.

The replication stated that the vessel was employed, by the United States, as a cartel, to bring to the United States, from Jamaica, a number of American prisoners; and having, as such, commenced her voyage, was compelled by stress of weather to put back to refit, and procure provisions; on which account these advances were made, and without which she would not have performed her voyage. To this replication, there was a demurrer and joinder by the libellants. The District Court dismissed the libel, from which decision the cause came by appeal to this court.

WASHINGTON, J. The general rule of the common law of England is, that an alien enemy cannot maintain an action in the courts of that country, during the war, in his own name. The rule is not founded upon any legal objection to the contract or other ground of the action, but, upon the disability of the party to sue; arising out of the hostile character which the war has impressed upon him. This rule appears to be inflexible, except where the alien enemy is under the protection of the king; as where he comes into the kingdom after the war, by license of the sovereign; or being there at the time of the war, is permitted to continue his domicile.

Within the reason upon which the general rule was probably founded, it has been also decided that, if the person beneficially interested in the subject in dispute be an alien enemy, the action cannot be supported, even in the name of a British subject, his trustee, any more than it could have been in that of the alien enemy himself. Public policy, which forbids that the property sued for should be carried out of the country to enrich the enemy, would be violated equally in the one case as in the other.

But where the reason ceases, upon which this doctrine is founded, which forbids the interest of an alien enemy to be asserted by his trustee, though a subject, the rule does not prevail; and therefore if

plied in any treaty stipulation to that effect entered into by the belligerents. Nor do the learned gentlemen who argued this cause controvert the general rule; they only attempt to except this case from its application: First, by an imputed permission on behalf of the United States; Second, by shifting the creation of the contract from the date, which appears on its face, to the time of delivery of the goods, which, in point of time, were not shipped until after the peace. * * *

"It will be perceived here that the court does not deny the power of the belligerent states so to modify the relations of a state of war as to permit commercial intercourse or other intercourse according to their will. They who give the law may modify it, and except from its operation whatever ground they choose to declare neutral. The language of jurists is uniform on this subject, and reason, policy and humanity sustain the exercise of such a power." — ED.

the contract on which the suit is brought, arise directly or collaterally out of a trade licensed by the sovereign authority of the government, in whose courts redress is sought, enemy interest in the subject in controversy will not defeat the action depending in the name of the subject as trustee. Thus, it has been held that action upon an insurance made upon a licensed trade with the enemy for the use of an enemy, may be supported in the common-law courts of England, in the name of the agent who effected the insurance, he being a British subject. For all the purposes of this trade, the person for whose benefit the license was granted, is to be regarded, virtually, as an adopted subject of Great Britain; and his trade under such license as British trade:— and, the end being licensed, the ordinary legitimate means of attaining that end is considered as being also licensed. 13 East, 332; *Usparicha* v. *Noble*, 8 East, 273; *Kensington* v. *Inglis*, 15 East, 419.

It is clear, therefore, that wherever the trade with an enemy, and consequently a contract founded thereon, are rendered lawful by the license of the sovereign, the objection to the person of the plaintiff, on the ground of his being an alien enemy, is merely technical and *stricti juris*. Although the reason on which the rule was founded does not exist in such a case, the court being bound to support the beneficial interest of such licensed alien enemy, yet it does not appear that any judge of the common-law courts of England has thought himself at liberty to entertain such a suit, if brought in the name of the alien enemy. Yet I know of no case in which it has been decided, upon the point coming directly in judgment, that such an action could not be maintained. In the case of *Cornu* v. *Blackburne*, Dougl. 641, the action was supported in the name of the alien enemy upon a ransom bond; but no plea was put in to bar the right of the plaintiff to sue; and the cause was decided upon another point. In *Anthon* v. *Fisher*, Dougl. (note) 649, it was laid down generally, that an alien enemy cannot, by the municipal laws of England, sue for the recovery of a right acquired by him in actual war; but the particular case in which that decision was given was that of a ransom bond; and of course the decision of the court should be considered as applicable to such a case. But the case of a ransom bond is very different from that of a contract arising out of a licensed trade. In the former, the hostile character of the obligee is in no respect removed; on the contrary it is an act of hostility which gives rise to it. In the latter case, the hostile character of the party with whom the contract is made, does not attach either to him or to the contract. "He is to be regarded (in the words of Lord Ellenborough) virtually as an adopted subject of Great Britain, and his trade as British trade." If he is to be so considered, it would seem to follow, that all objection to a suit being maintained in

the name of such adopted subject, would be at an end; as much so if the plaintiff were, at the time of bringing the suit, personally within the British dominions. It must, nevertheless, be acknowledged that, in the case of *Kensington* v. *Inglis*, 8 East, 273, the court seemed to be of opinion that, even in the case of a licensed trade, the suit cannot be maintained in the name of the alien enemy. But, as the suit was in the name of a subject, the opinion, as to this point, was not essential to the decision of the cause; and, of course, it ought not to rank higher than an *obiter dictum*.

This examination of the subject has been intended to show that, in cases where the contract upon which the suit is brought, arises out of a licensed trade, an objection founded upon the disability of the nominal plaintiff to maintain the action, on the ground of alien enemy, is extremely feeble; and can only be supported by a tenacious adherence to a rigid rule of the common law, notwithstanding the reason of the rule should, in this particular case, have ceased.

The question, then, is, does this rule apply in all its rigor to courts acting under the general law of nations, and proceeding according to the civil law? I think it does not. Bynkershoek (p. 55) appears to be very strong upon this subject. He says that where commerce is permitted amongst enemies, contracts, and actions founded upon them, are permitted; "for who," he asks, "will sell and carry goods to an enemy, without the right of recovering the price of them? and what hope can there be of recovering that price, if one cannot judicially compel payment from his enemy purchaser." In cases of this nature, in courts proceeding according to the civil law, the only question is, has the plaintiff a *persona standi in judicio?* Can he be heard as a plaintiff in that court? Bynkershoek, in the above quotations, gives the answer. The right to sue, and to compel payment, is a necessary incident to his right to trade and to contract. This doctrine of Bynkershoek has received the entire approbation of Sir William Scott, in the case of the *Hoop*, in which he gives the sense of that learned jurist as amounting to this, that the legality of commerce, and the mutual use of courts of justice, are inseparable, 1 Rob. 168.

The distinction which I am endeavoring to maintain, founded upon the peculiar rules which prevail in the courts of common law, and those proceeding by the rules of the civil law, may be illustrated by analogous cases of every day's practice. No rule is more rigidly adhered to by the common-law courts of England, than that the assignee of a chose in action cannot maintain a suit in those courts, in his own name, upon common-law principles. Neither can a *cestui que trust* bring an action in his own name; although, in both cases, the court will, for certain purposes, take notice of those equitable interests. But

in a court of equity, where the strict rules of the common-law courts do not obtain admission, the person having the beneficial interest is admitted to sue, and to assert his right, in his own name. In like manner, and within the same principle, it would seem reasonable that where the party is divested of his hostile character, by which he acquires a *persona standi in judicio*, the technical objection of the common-law courts to his being heard, as plaintiff, ought to be disregarded in courts which proceed by different rules.

The only remaining question is, can a contract, made with an alien enemy, by the owner or master of a cartel vessel, in relation to the navigation of that vessel, upon the service in which she is engaged, be enforced in a court proceeding according to the rules of the civil law, and having jurisdiction of the subject-matter? What is the character of a cartel vessel, and of the persons concerned in her navigation? The flag of truce which she carries throws over her and them the mantle of peace. She is, *pro hac vice*, a neutral licensed vessel; and all persons concerned in her navigation, upon the particular service in which both belligerents have employed her, are neutral, in respect to both, and under the protection of both. She cannot carry on commerce under the protection of her flag, because this was not the business for which she was employed and for which the immunities of that flag were granted to her. She is engaged in a special service, to carry prisoners from one place to another; and, whilst so engaged, she is under the protection of both belligerents, in relation to every act necessarily connected with that service. It follows that all contracts made for equipping and fitting her for this service are to be considered as contracts made between friends, and consequently ought to be enforced in the tribunals of either belligerents, having jurisdiction of the subject. The agreement of the two nations, by their agents to make her a cartel, amounts to a license by both to perform the service in which she is employed, and sanctifies all the means necessary to that end.

Upon these principles, I am of opinion, that the libellants were capable of maintaining this suit; and that the plea of the claimants ought to be overruled.

The proceedings have not been regular; but I shall not go further, after reversing the sentence below, than to direct the appellants to answer the libel.[1]

[1] The cartel need not be concluded during, but may be made in peace in anticipation of war, *The Carolina*, 1807, 6 C. Rob., 336; as it effects the exchange of prisoners, it is confined to the belligerents, *The Rose in Bloom*, 1811, 1 Dod. 57, 60.

Vessels actually employed under the agreement are protected both going and coming in the line of duty, but vessels about to enter or sailing with the intention

Section 32. — Commercial Domicile.

THE "HARMONY."

High Court of Admiralty, 1800.

(2 *C. Robinson*, 322.)

This was one of several American vessels in which a claim had been reserved for part of the cargo, on further proof to be made of the national character of G. W. Murray, who appeared in the original case, as a partner of a house of trade in America, but personally resident in France; restitution had been decreed in the several claims to the house of trade in America, with a reservation of the share of this partner.

G. W. Murray, a partner in a house of trade in New York, had gone to France, in 1794, as supercargo of a vessel, in behalf of his firm, to there dispose of the cargo; but with the exception of a brief visit to America in 1795–96, he continued to reside in France, and to receive and dispose of cargoes sent out from New York.

At the time of the first trial, Mr. G. W. Murray had not been in France a year; but from the evidence of letters, etc., Sir W. Scott thought the intention was to form a permanent residence and correspondence in France. This belief was strengthened by the fact

of entering into the service on reaching a particular port are not thus privileged and protected, *The Daifjie*, 1800, 3 C. Rob. 139, 141; a formal contract is the rule, but an informal agreement followed by use as cartel ship will be enforced, *La Gloire*, 1804, 5 C. Rob. 192; a cartel ship is primarily for the ransom of prisoners, but not exclusively so; it may therefore be used to carry into effect previous treaty stipulations of the contracting parties, *The Carolina*, *supra*; the court construes the cartel liberally and is satisfied with a *bona fide* and substantial performance of the requirements, but trade of all kinds carried on in the vessel subjects the cargo, *La Rosina*, 1800, 2 C. Rob. 372, and at times the vessel to confiscation, *The Venus*, 1803, 4 C. Rob. 355; merchandise carried by express permission will not, though goods carried in excess of the permission will be confiscated, *The Carolina*, *supra*; prisoners carried home are bound to refrain from hostilities of all kinds on board, hence capture or recapture from the enemy of a vessel of their own country is illegal and vests no title in the captor, *The Mary*, 1804, 5 C. Rob. 200; a cartel is not a treaty in the sense of the Constitution, and the cartel for the exchange of prisoners, between the United States and Great Britain, in 1813, was ratified by the Secretary of State, not the Senate (May 14), 2 Halleck, 326; but when concluded it is of such force that the sovereign power may not annul it. *Henderson's Case*, 1863, 2 Pittsburg R. 440. See case last cited for the question of parole, and for the matter of capitulation, see *Rucker's Case*, 1866, 1 Am. Law. Rev. 217. — Ed.

that Mr. Murray had returned to France in 1796 and remained there till 1800. Hence his return to America in 1795–96 was probably but temporary, and he was considered to have had a residence in France for six years.

Judgment,—Sir W. Scott:—[1]

"This is a question which arises on several parcels of property claimed on behalf of G. W. Murray; and it is in all of them a question of residence or domicil, which I have often had occasion to observe, is in itself a question of considerable difficulty, depending on a great variety of circumstances, hardly capable of being defined by any general precise rules. The active spirit of commerce now abroad in the world, still farther increases this difficulty by increasing the variety of local situations, in which the same individual is to be found at no great distance of time; and by that sort of extended circulation, if I may so call it, by which the same transaction communicates with different countries, as in the present cases, in which the same trading adventures have their origin (perhaps) in America, travel to France, from France to England, from England back to America again, without enabling us to assign accurately the exact legal effect of the local character of every particular portion of this divided transaction.

"In deciding such cases, the necessary freedom of commerce imposes likewise the duty of a particular attention and delicacy; and strict principle of law must not be pressed too eagerly against it; and I have before had occasion to remark, that the particular situation of America, in respect to distance, seems still more particularly to entitle the merchants of that country to some favourable distinctions. They live at a great distance from Europe; they have not the same open and ready and constant correspondence with individuals of the several nations of Europe, that these persons have with each other; they are on that very account more likely to have their mercantile confidence in Europe abused, and therefore to have more frequent calls for a personal attendance to their own concerns; and it is to be expected that when the necessity of their affairs calls them across the Atlantic, they should make rather a longer stay in the country where they are called, than foreign merchants who step from a neighbouring country in Europe, to which every day offers a convenient opportunity of return.

"In considering this particular case, it may not be improper to remark, that circumstances occur in the evidence that address themselves forcibly to private commiseration, remarking, however, at the

[1] Statement of case is varied and only part of the decision of the learned judge is given. — Ed.

same time, that public duty can allow only a very limited effect to such considerations, and still less to another, that has been pressed upon me, that the money, if restored, is to go in payment of debts due to British creditors, from the bankrupt estate of this unfortunate person.

"My business is to inquire whether he is entitled to recover it, without regard to the probable application of it, if it finds its way again into his possession.

"Of the few principles that can be laid down generally, I may venture to hold, that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, *that* shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that *may*, *probably*, or *does actually* detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose.

"A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a lawsuit, it may happen, and indeed is often used as a ground of vulgar and unfounded reproach (unfounded as matter of just reproach though the fact may be true,) on the laws of this country, that it may last as long as himself. Some suits are famous in our juridical history for having even outlived generations of suitors. I cannot but think that against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him and mixed themselves with his original design, and impressed upon him the character of the country where he resided.

"Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes, and other means, to the strength of that country, I am of opinion, that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long-continued residence. There is a time which will estop such a plea; no rule can fix the time *a priori*, but such a time there *must* be.

"In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business, which would not fix a

domicil in a certain space of time, would nevertheless have that effect, if distributed over a large space of time. Suppose an American comes to Europe, with six contemporary cargoes, of which he had the present care and management, meaning to return to America immediately; they would form a different case from that, of the same American, coming to any particular country of Europe, with one cargo, and fixing himself there, to receive five remaining cargoes, one in each year successively. I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicil.

THE "INDIAN CHIEF."

HIGH COURT OF ADMIRALTY, 1801.

(3 *C. Robinson*, 12.)

Judgment. — Sir W. SCOTT:[1] —

"This is the case of a ship seized in the port of Cowes, where she came to receive orders respecting the delivery of a cargo taken in at Batavia, with a professed original intention of proceeding to Hamburg; but on coming into this country for particular orders, the ship and cargo were seized in port. It does not appear clear to the court, that it might not be a cargo intended to be delivered in this country, as many such cargoes have been, under the Dutch property act: I mention this to meet an observation that has been thrown out, 'that it is doubtful whether the ship might not be confiscable on the ground of being a neutral ship coming from a colony of the enemy, not to her own ports or the ports of this country.' I cannot assume it as a demonstrated fact in the case, that the cargo was to be delivered at Hamburg.—The vessel sailed in 1795, and as an American ship with an American pass, and all American documents; but nevertheless if the owner really resided here, such papers could not protect his vessel; if the owner was resident in England, and the voyage such as an English merchant could not engage in, an American residing here, and carrying on trade, could not protect his ship merely by putting American documents on board; his interest must stand or fall according to the

[1] Statement of the case is omitted. — ED.

determination which the court shall make on the national character of such a person.

"There are two propositions which are not to be controverted; that Mr. Johnson is an American generally by birth, which is the circumstance that first impresses itself on the mind of the Court; and also by the part which he took on the breaking out of the American war. He came hither when both countries were open to him; but on the breaking out of hostilities, he made his election which country he would adhere to, and in consequence thereof went to France. As to the doubt that has been suggested, whether he would be deemed an American, not having been personally there at the time of the declaration of the independence of that country; I think that is sufficiently cleared up, by the circumstances of his being adopted as such by the act of the American government, declaring him and his family to be American subjects, and by the official character which that government has intrusted to him; I am of opinion, therefore, that he has not lost the benefit of his native American character. He came however to this country in 1783, and engaged in trade, and has resided in this country till 1797; during that time he was undoubtedly to be considered as an English trader; for no position is more established than this, that if a person goes into another country, and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country; I should therefore have no doubt in pronouncing that Mr. Johnson was to be considered as a merchant of this country, at the time of sailing of this vessel on her outward voyage. That leads me to take a view of the circumstances of this case; the ship went out in 1795 with Mr. Hewlet on board, and Mr. Johnson says, 'he sent out Mr. Hewlet as supercargo, and put the vessel under his control to take freight for America, but that his designs were frustrated by various circumstances;' and the ship actually went to Madeira, Madras, Tranquahar, and Batavia, and from thence to Cowes where she was arrested.

"Now there can be no doubt that if Mr. Johnson had continued where he was at the time of sailing, if he had remained resident in England, it must be considered as a British transaction; and therefore a criminal transaction, on the common principle that it is illegal in any person owing an allegiance, though temporary, to trade with the public enemy. But it is pleaded that he had quitted this country before the capture, and that he had done this in consequence of an intention he had formed of removing much earlier, but that he had been prevented by obstacles that obstructed his wish; to this effect the letter of March 1797, is ex-

hibited, which must have been preceded by private correspondence and application to some of his creditors. It does, I think, breathe strong expressions of intention, and of an ardent desire to get over the restraint that alone detained him; and it affords conclusive reason to believe that if he had been a free man, and at liberty to go where he pleased, he would have removed long before; and that he was detained here as a hostage, as he describes himself, to his creditors, on motives of honor creditable to his character. On the 9th of September 1797 he did actually retire; of the sincerity of his quitting this country there can hardly be a doubt entertained; it is almost impossible to represent stronger or more natural grounds for such a measure; and I do not think the Court runs any risk of encountering a fraudulent pretension, put forward to meet the circumstances of the moment, without anything of an original and *bona fide* intention at the bottom of it.

The ship was sent out under the management of the supercargo, and it is said that Mr. Hewlet exceeded his commission. The affidavit does not go so far; it does not appear from that, that the agent had not the power to enter into such an engagement; but this, I think, appears clearly, that it was the understanding both of Mr. Johnson, and of his agent, Mr. Hewlet, who had been his clerk, and to whom he refers for a confirmation of his avowed design of removing, that before the completion of such a voyage Mr. Johnson would be in America; therefore if the illegality of the voyage must be supposed to have presented itself to their minds, as a British transaction, owing to Mr. Johnson's residence in England, there was reason enough for them to conclude that Mr. Johnson would be removed; and, on that view of the matter, although it is certain that an agent would bind his employer in such a case, there is ground sufficient to presume that the agent acted fairly and *bona fide*, and under the expectation that Mr. Johnson would be returned to America.

"The ship arrives a few weeks after his departure; and taking it to be clear, that the national character of Mr. Johnson as a British merchant was founded in residence only, that it was acquired by residence, and rested on that circumstance alone; it must be held that from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American: The character that is gained by residence ceases by residence: It is an adventitious character which no longer adheres to him, from the moment that he puts himself in motion, *bona fide*, to quit the country, *sine animo revertendi*. The courts that have to apply this principle, have applied it both ways, unfavorably in some cases, and

favorably in others. This man had actually quitted the country. Stronger was the case of Mr. Curtissos (The *Snelle Zeylder*, Lds. Ap. 25, 1783); he was a British born-subject, that had been resident in Surinam and St. Eustatius, and had left those settlements with an intention of returning to this country; but he had got no farther than Holland, the mother country of those settlements, when the war broke out. It was determined by the Lords of Appeal, that he was *in itinere*, that he had put himself in motion, and was in pursuit of his native British character: and as such, he was held to be entitled to the restitution of his property. So here, this gentleman was in actual pursuit of his American character; and, I think, there can be no doubt that his native character was strongly and substantially revived, not occasionally, nor colorably, for the mere purpose of the present claim; and therefore I shall restore the ship."[1]

THE "VENUS."

Supreme Court of the United States, 1814.

(8 *Cranch*, 253.)

Washington, J., delivered the opinion of the majority of the court.[2]

" * * * The great question involved in this, and many other of the prize cases which have been argued, is, whether the property of these claimants who were settled in Great Britain, and engaged in the commerce of that country, shipped before they had a knowledge of the war, but which was captured, after the declaration of war, by an American cruiser, ought to be condemned as lawful prize. It is contended by the captors, that as these claimants had gained a domicil in Great Britain, and continued to enjoy it up to the time war was declared, and when these captures were made, they must be considered as British subjects, in reference to this property, and, consequently, that it may legally be seized as prize of war, in like manner as if it had belonged to real British subjects. But, if not so, it is then insisted that these claimants, having, after their naturalization in the United States, returned to Great Britain, the country of

[1] The cargo of this vessel belonged to Mr. Millar, resident in Calcutta as American consul. He was held to be a British merchant engaged in trade with the enemy, and his goods were therefore condemned as *droits* of admiralty, being seized in a British port. His consular character made no difference whatever in protecting his trade. — Ed.

[2] Statement of the case and part of the opinion of Washington, J., omitted. — Ed.

their birth, and there resettled themselves, they became redintegrated British subjects, and ought to be considered by this court in the same light as if they never had emigrated. On the other side it is argued, that American citizens settled in the country of the enemy, as these persons were, at the time war was declared, were entitled to a reasonable time to elect, after they knew of the war, to remain there, or to return to the United States; and that until such election was, *bona fide*, made, the courts of this country are bound to consider them as American citizens, and their property shipped before they had an opportunity to make this election, as being protected against American capture.

"There being no dispute as to the facts upon which the domicil of these claimants is asserted, the questions of law alone remain to be considered. They are two.—First, by what means and to what extent, a national character may be impressed upon a person different from that which permanent allegiance gives him? and, secondly, what are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or in which he had been naturalized?

"1. The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, *domicil*, which he defines to be, 'a habitation fixed in any place with an intention of always staying there.' * * *

"The question whether the person to be affected by the right of domicil had sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. On this ground it is, that the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidence of an intention permanently to reside there, as to stamp him with the national character of the state where he resides. In questions on this subject, the chief point to be considered, is the *animus manendi;* and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence even of a few days. This is one of the rules

of the British courts, and it appears to be perfectly reasonable. Another is, that a neutral or subject, found residing in a foreign country is presumed to be there *animo manendi;* and if a state of war should bring his national character into question, it lies upon him to explain the circumstance of his residence—(the *Bernon*, 1 C. Rob., 86, 102). * * *

"2. The next question is, what are the consequences to which this acquired domicil may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes a permanent allegiance? A neutral in his situation, if he should engage in open hostilities with the other belligerent would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance. But although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such, with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or, probably, refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals; and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent state domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world.

"But this national character which a man acquires by residence may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he has resided, on his way to another. To use the language of Sir W. Scott, it is an adventitious character gained by residence, and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi* (3 C. Rob., 17,12, *The Indian Chief*). The reasonableness of this rule can hardly be disputed. Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal *bona fide*, and without an intention of returning. If anything short of actual removal be admitted to work a change in the national character

acquired by residence, it seems perfectly reasonable that the evidence of a *bona fide* intention to remove should be such as to leave no doubt of its sincerity. Mere declaration of such an intention ought never to be relied upon, where contradicted, or at least rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies those declarations with acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded which the nature of such a case can furnish. And is it not proper that the courts of a belligerent nation should deny to any person the right to use a character so equivocal, as to put it in his power to claim whichever may best suit his purpose, when it is called in question? If his property be taken trading with the enemy, shall he be allowed to shield it from confiscation, by alleging that he had intended to remove from the country of the enemy to his own, then neutral, and, therefore, that, as a neutral, the trade was lawful? If war exists between the country of his residence and his native country, and his property be seized by the former, or by the latter, shall he be heard to say in the former case, that he was a domiciled subject of the country of the captor, and in the latter, that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character; and thus to parry the belligerent rights of both? It is to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned has been adopted. Upon what sound principle can a distinction be framed between the case of a neutral, and the subject of one belligerent domiciled in the country of the other at the breaking out of the war? The property of each, found engaged in the commerce of their adopted country, belonging to them, before the war, in their character of subjects of that country, so long as they continued to retain their domicil; and a state of war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows that all the property, which was once the property of a friend, belongs now, in reference to that property, to an enemy. This doctrine of the common-law and prize courts of England is founded, like that mentioned under the first head, upon national law; and it is believed to be strongly supported by reason and justice. It is laid down by Grotius, p. 563, 'that all

the subjects of the enemy who are such from a permanent cause, that is to say, settled in the country, are liable to the law of reprisals, whether they be natives or foreigners; but not so if they are only trading or sojourning for a little time.' And why, it may be confidently asked, should not the property of such subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicil, or, in the words of Grotius, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound, by such residence, to the society of which they are members, subject to the laws of the state, and owing a qualified allegiance thereto; they are obliged to defend it (with an exception in favor of such a subject, in relation to his native country), in return for the protection it affords them, and the privileges which the laws bestow upon them as subjects. The property of such persons, equally with that of the native subjects in their totality, is to be considered as the goods of the nation, in regard to other states. It belongs, in some sort, to the state, from the right which she has over the goods of its citizens, which make a part of the sum total of its riches, and augment its power. Vatt., 147, and also B., 1, c. 14., § 182. In reprisals, continues the same author, we seize on the property of the subject, just as we would that of the sovereign; everything that belongs to the nation is subject to reprisals, wherever it can be seized, with the exception of a deposit entrusted to the public faith. B., 2, c. 18, § 344. Now if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the nation, it would seem difficult to maintain that the same consequences would not follow in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation. If, then, nothing but an actual removal, or *bona fide* beginning to remove, can change a national character acquired by domicil, and if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person in his character of a subject, what is there that does, or ought to exempt it from capture by the privateers of his native country, if, at the time of capture, he continues to reside in the country of the adverse belligerent? It is contended that a native or naturalized subject of one country, who is surprised, in the country where he was domiciled, by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes a permanent allegiance, and that, until such election is made, his property ought to be pro-

tected from capture by the cruisers of the latter. This doctrine is believed to be as unfounded in reason and justice, as it clearly is in law. In the first place, it is founded upon a presumption that the person will certainly remove, before it can possibly be known whether he may elect to do so or not. It is said that this presumption ought to be made, because, on receiving information of the war, it will be his duty to return home. This position is denied. It is his duty to commit no acts of hostility against his native country, and to return to her assistance when required to do so; nor will any just nation, regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse her permission to him to withdraw whenever he wishes to do so, unless under peculiar circumstances, which, by such removal at a critical period, might endanger the public safety. The conventional law of nations is in conformity with these principles. It is not uncommon to stipulate in treaties that the subjects of each shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects either to remove or to remain. They are left free to choose for themselves; and when they have made their election, they claim the right of enjoying it under the treaty. But until the election is made, their former character continues unchanged.

"Until this election is made, if his property found upon the high seas, engaged in the commerce of his adopted country, should be permitted by the cruisers of the other belligerent to pass free, under the notion that he may elect to remove, upon notice of the war, and should arrive safe, what is to be done in case the owner of it should afterwards elect to remain where he is? or if captured and brought immediately to adjudication, it must, upon this doctrine, be acquitted until the election to remain is made known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all, and can lose nothing. If he, after the capture, should find it his interest to remain where he is domiciled, his property embarked before his election was made, is safe; and if he finds it best to return, it is safe of course. It is safe whether he goes or stays. This doctrine, producing such contradictory consequences, is not only unsupported by any authority, but it would violate principles long and well established in the prize courts of England, and which ought not, without strong reasons which may render them inapplicable to this country, to be disregarded by this court. The rule there is, that the character of the property, during war, cannot be changed *in transitu*, by any act of the party, subsequent to the capture. The rule indeed goes farther:

as to the correctness of which in its greatest extension, no opinion need now be given; but it may safely be affirmed that this charge cannot and ought not to be affected by an election of the owner and shipper of it made subsequent to the capture, and, more especially, after a knowlege of the capture is obtained by the owner. Observe the consequences which would result from it. The capture is made and known. The owner is allowed to deliberate whether it is his interest to remain a subject of his adopted, or of his native country. If the capture be made by the former, then he elects to be a subject of that country; if by the latter, then a subject of that. Can such a privileged situation be tolerated by either belligerent? Can any system of law be correct, which places an individual who adheres to one belligerent, and, to the period of his election to remove, contributes to increase her wealth, in so anomalous a situation as to be clothed with the privilege of a neutral, as to both belligerents? This notion about a temporary state of neutrality impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war and made his election, is altogether a novel theory, and seems, from the course of the argument, to owe its origin to a supposed hardship to which the contrary doctrine exposes him. But if the reasoning employed on this subject be correct, no such hardship can exist. For if, before the election is made, his property on the ocean is liable to capture by the cruisers of his native and deserted country, it is not only free from capture by those of his adopted country, but is under its protection. The privilege is supposed to be equal to the disadvantage, and is therefore just. The double privilege claimed seems too unreasonable to be granted. * * *[1]

[1] Condemnation was pronounced in all the cases.

Chief Justice Marshall dissented in a vigorous opinion from so much of that opinion as subjects to confiscation the property of a citizen shipped before a knowledge of the war, and which disallows the defence founded on an intention to change his domicile and to return to the United States, manifested in such a manner, and within a reasonable time after knowledge of the war, although it be subsequent to the capture. In this dissent, Livingston, J., concurred. For an elaborate summary of this dissenting opinion, which seems more in accordance with reason than the one laid down by the majority of the bench, see 1 Duer's Marine Insurance, 505–509. — Ed.

BENTZEN v. BOYLE.

SUPREME COURT OF THE UNITED STATES, 1815.

(9 *Cranch*, 191.)

MARSHALL, Ch. J., delivered the opinion of the court.

"The Island of Santa Cruz, belonging to the kingdom of Denmark, was subdued during the late war, by the arms of his Britannic Majesty. Adrien Benjamin Bentzen, an officer of the Danish government, and a proprietor of land therein, withdrew from the island on its surrender, and has since resided in Denmark. The property of the inhabitants being secured to them, he still retained his estate in the island under the management of an agent, who shipped thirty hogsheads of sugar, the product of that estate, on board a British ship, to a commercial house in London, on account and risk of the said A. B. Bentzen. On her passage she was captured by the American privateer, the *Comet*, and brought into Baltimore, where the vessel and cargo were libelled as enemy property. A claim for these sugars was put in by Bentzen; but they were condemned with the rest of the cargo; and the sentence was affirmed by the circuit court. The claimant then appealed to this court.

Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But, for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by a treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

"Must the product of a plantation in that island, shipped by the proprietor himself, who is a Dane residing in Denmark, be considered as British, and therefore enemy property?

"In arguing this question, the counsel for the claimant has made two points. 1. That this case does not come within the rule applicable to shipments from an enemy country, even as laid down in the British courts of admiralty. 2. That the rule has not been rightly laid down in those courts and consequently will not be adopted in this. 1. Does the rule laid down in the British courts of admiralty embrace this case?

"It appears to the court that the case of the *Phœnix* [1] is precisely in point. In that case a vessel was captured on a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam.

"The counsel for the captors considered the law of the case as entirely settled. The counsel for the claimant did not controvert this position. They admitted it; but endeavoured to extricate their case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his opinion, Sir WILLIAM SCOTT lays down the rule thus: 'Certainly nothing can be more decided and fixed, as the principles of this court and the Supreme Court upon very solemn arguments, than that the possession of the soil does impress upon the owner the character of the country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the Superior Court, that it is no longer open to discussion. No question can be made on the point of law, at this day.'

"Afterwards, in the case of the *Vrow Anna Catharina*, 5 C. Rob., 167, Sir WILLIAM SCOTT lays down the rule, and states its reason. 'It cannot be doubted,' he says, 'that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation.'

"This rule laid down with so much precision, does not, it is contended, embrace Mr. Bentzen's claim, because he has not 'incorporated himself with the permanent interests of the nation.' He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

"This distinction does not appear to the court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the disposition with which he acquires the soil, or on his general character. The acquisition of land in Santa Cruz binds him, so far as respects that land, to the fate of Santa Cruz, whatever its destiny may be. While that island belonged to Denmark, the produce of the soil,

[1] 5 C. Rob., 20.

while unsold, was, according to this rule, Danish property, whatever might be the general character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British.

"The general commercial or political character of Mr. Bentzen could not, according to this rule, affect this particular transaction. Although incorporated, so far as respects his general character, with the permanent interests of Denmark, he was incorporated so far as respects his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was at that time British; and though as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy; he could ship his produce to Great Britain in perfect safety.

"The case is certainly within the rule as laid down in the British courts. The next inquiry is: how far that rule will be adopted in this country?

"The law of nations is the great source whence we derive those rules, respecting neutral and belligerent rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded on a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

"Without taking a comparative view of the justice or fairness of the rules established in the British courts, and of those established in the courts of other nations, there are circumstances not to be excluded from consideration, which give to those rules a claim to our attention, that we cannot entirely disregard. The United States having, at one time, formed a component part of the British Empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it.

"It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British courts, will be considered as forming a rule for the American courts, or that any recent rule of the British

courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

"The rule laid down in the *Phœnix* is said to be a recent rule, because a case solemnly decided before the Lords Commissioners in 1783, is quoted in the margin as its authority. But that case is not suggested to have been determined contrary to former practice or former opinions. Nor do we perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

"The opinion that the ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, is an opinion which certainly prevails very extensively. It is not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicil of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offense to the course of human opinion to say that the proprietor, so far as respects his interest in this land, partakes of this character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. In condemning the sugars of Mr. Bentzen as enemy property, this court is of opinion that there was no error, and the sentence is affirmed with costs."

THE "PRIZE CASES."

Supreme Court of the United States, 1862.

(2 *Black*, 671.)

II.[1] "We come now to the consideration of the second question. What is included in the term 'enemies' property?'

"Is the property of all persons residing within the territory of the states now in rebellion, captured on the high seas, to be treated as 'enemy's property' whether the owner be in arms against the government or not?

"The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war.

[1] For first part of this Case, see p. 475, *ante*. — Ed.

Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas.

"The appellants contend that the term 'enemy' is properly applicable to those only who are subjects or citizens of a foreign state at war with our own. They quote from the pages of the common law, which say, 'that persons who wage war against the king may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies.'

"They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in the possession of the insurgent government, are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party and its '*de facto* government' to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance and made war against the government by treasonably resisting its laws.

"They contend, also, that insurrection is the act of individuals, and not of a government or sovereignty; that the individuals engaged are the subjects of law. That confiscation of their property can be effected only under a municipal law. That by the law of the land such confiscation cannot take place without the conviction of the owner of some offence, and finally that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the national government, and consequently that the constitution and laws of the United States are still operative over persons in all the states for punishment as well as protection.

"This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations.

"It assumes that where a civil war exists, the party belligerent claiming to be sovereign, cannot for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party.

"The insurgents may be killed on the battle-field or by the executioner; his property on land may be confiscated under the munic-

ipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is 'unconstitutional'!!! Now, it is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights; (see 4 Cr., 272). Treating the other party as a belligerent and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity. We have shown that a civil war such as that now waged between the Northern and Southern states, is properly conducted according to the humane regulations of public law as regards capture on the ocean.

"Under the very peculiar constitution of this government, although the citizens owe supreme allegiance to the Federal government, they owe also a qualified allegiance to the state in which they are domiciled.

"Their persons and property are subject to its laws.

"Hence, in organizing this rebellion, they have *acted as states* claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal government. Several of these states have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign state. Their right to do so is now being decided by wager of battle.

"The ports and territory of each of these states are held in hostility to the general government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force,—south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.

"All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors.

"But in defining the meaning of the term 'enemies' property,' we shall be led into error if we refer to Fleta and Lord Coke for their definition of the word 'enemy'. It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.

"Whether property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the

owner. 'It is the illegal traffic that stamps it as "enemies' property." It is of no consequence whether it belongs to an ally or a citizen. 8 Cr., 384. The owner, *pro hac vice*, is an enemy.' 3 Wash. C. C. R., 183.

"The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicil of the owner, and much more so if he reside and trade within their territory."[1]

[1] Domicil. — "A commercial domicil," says Mr. Dicey, "is such a residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicil is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home. When a person's commercial domicil is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there."

(Dicey on Domicil, 345; Conflict of Laws, 86 *et seq.*, especially appendix, note 3 on Definition of Domicil, 727–735; note 4, on Commercial domicil in time of war, 735–740, for reference to approved texts, cases, opinions, and criticisms thereof.)

In the case of the *Antonia Johanna*, 1816, 1 Wheaton, 159, the Supreme Court of the United States held that the share of a partner in a neutral house is, *jure belli*, subject to confiscation where his own domicil is in a hostile country. 3 Wharton's Digest, 343.

In the case of the *Freundschaft*, 1819, 4 Wheaton, 105, the court held, that the property of a house of trade established in the enemy's country is condemnable as prize, whatever may be the personal domicil of the partners. 3 Wharton's Digest, 343.

In *Nigel Gold Mining Co., Lim.* v. *Hoode*, 1901, 17 L. T. R. 711, it was held that the company had only a commercial domicil in the Transvaal, and that this did not invest it with enemy character. In a note to this case in 15 Harv. Law Rev. 237, it is said: "The status of the corporation and not that of its members was in question, and in the case of corporations, as in that of individuals, enemy character is determined by domicil. *Society, &c.* v. *Wheeler*, 2 Gall. 105, 131; *The Danckebaar Africaan*, 1 Rob. 107. Even if the plaintiff company be regarded as merely commercially domiciled, it takes enemy character on the outbreak of war, for when a foreign corporation establishes a permanent agency in a state, it is, in time of war, as to the business transacted there, in the same position as a domestic corporation. *Martino* v. *International Life Ins. Soc.*, 53 N. Y. 339. Yet the law covering such a company as the plaintiff in the principal case is stronger still. An incorporated company that takes letters of incorporation in a second state has a separate legal domicil in that state. *Martin* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673. The plaintiff company must therefore be regarded as having enemy character. The court professes to bring the case within the rule of the *Venus*, 8 Cranch, 253. In that case the owner had abandoned his foreign domicile and business *bona fide*; but in the principal case there was nothing equivalent to such abandonment by the corporation. The decision can be explained only by the supposed humanitarian tendency of the present day in applying the rules of war."

Other cases on *Commercial Domicil* are: *Bell* v. *Reid*, 1 Maul. & Selw. 726 (1813);

MITCHELL v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES, 1874.

(21 *Wallace*, 350)

Mr. Justice SWAYNE delivered the opinion of the court, as follows:

At the time when Mitchell passed within the rebel lines the war between the loyal and the disloyal States was flagrant. It speedily assumed the largest proportions. Important belligerent rights were conceded by the United States to the insurgents. Their soldiers when captured were treated as prisoners of war, and were exchanged and not held for treason. Their vessels when captured were dealt with by our prize courts. Their ports were blockaded and the blockades proclaimed to neutral nations. Property taken at sea, belonging to persons domiciled in the insurgent States, was uniformly held to be confiscable as enemy property. All these things were done as if the war had been a public one with a foreign nation. *The Prize Cases*, 2 Black, 687; *Mrs. Alexander's Cotton*, 2 Wallace, 417; *Mauran* v. *The Insurance Company*, 6 id. 1. The laws of war were applied in like manner to intercourse on land between the inhabitants of the loyal and the disloyal States. It was adjudged that all contracts of the inhabitants of the former with the inhabitants of the latter were illegal and void. It was held that they conferred no rights which could be recognized. Such is the law of nations, *flagrante bello*, as administered by courts of justice. Vattel, § 220; *Griswold* v. *Waddington*, 16 Johnson, 438; *Cooledge* v. *Guthrie*, 8 American Law Register, N. S. 20; *Coppel* v. *Hall*, 7 Wallace, 542; *United States* v. *Grossmayer*, 9 id. 72; *Montgomery* v. *United States*, 15 id. 400; *United States* v. *Lapene*, 17 id. 602; *Cutner* v. *United States*, id. 516.

While such was the law as to dealings between the inhabitants of the respective territories, contracts between the inhabitants of the rebel States not in aid of the rebellion were as valid as those, between

Wilson v. *Maryat*, 8 T. R. 45 (1798); *The San Jose Indiano*, 2 Gall. 268 (1814); *The Junge Klassina*, 5 C. Rob. 302–304 (1804); *The Herman*, 4 C. Rob. 228 (1802); *Sparenburg* v. *Bannatyne*, 1 Bos. & Pul. 163 (1797); *The Abo*, 1 Spinks, 349 (1854); *The Gerasimo*, 11 Moo. P. C. C. 88 (1857); *The Baltica*, 11 Moo. P. C. C. 141 (1857); *Mrs. Alexander's Cotton*, 2 Wall. 404 (1864); *The Flying Scud*, 6 Wall. 263 (1867).

For the view that a neutral merchant domiciled in a belligerent country does not acquire a belligerent character, and that his property at sea is neutral property, see *Le Hardy* v. *La Voltigeante*, Conseil des Prises, an ix. (1 Pistoye et Duverdy, 321). — ED.

themselves, of the inhabitants of the loyal States. Hence this case turns upon the point whether the appellant was domiciled in the Confederate States when he bought the cotton in question.

When he took his departure for the South he lived and was in business at Louisville. He returned thither when Savannah was captured and his cotton was seized. It is to the intervening tract of time we must look for the means of solving the question before us. There is nothing in the record which tends to show that when he left Louisville he did not intend to return, or that while in the South he had any purpose to remain, or that when he returned to Louisville he had any intent other than to live there as he had done before his departure. Domicile has been thus defined: "A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." *Guger* v. *Daniel*, 1 Binney, 349, note. This definition is approved by Phillimore in his work on the subject. Pane 13. By the term *domicile*, in its ordinary acceptation, is meant the place where a person lives and has his home. Story's Conflict of Laws, § 41. The place where a person lives is taken to be his domicile until facts adduced establish the contrary. *Bruce* v. *Bruce*, 2 Bosanquet & Puller, 228, note; *Bampde* v. *Johnstone*, 3 Vesey, 201; *Stanley* v. *Bernes*, 3 Haggard's Ecclesiastical Reports, 437; Best on Presumptions, 235.

The proof of the domicile of the claimant at Louisville is sufficient. There is no controversy between the parties on that proposition. We need not, therefore, further consider the subject.

A domicile once acquired is presumed to continue until it is shown to have been changed. *Somerville* v. *Somerville*, 5 Vesey, 787; *Harvard Coll.* v. *Gore*, 5 Pickering, 370; Wharton's Conflict of Laws, § 55. Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation. *Crookenden* v. *Fuller*, 1 Swabey & Tristam, 441; *Hodgson* v. *De Buchesne*, 12 Moore's Privy Council, 288 (1858). To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired, the old one remains. Wharton's Conflict of Laws, § 55, and the authorities there cited. These principles are axiomatic in the law upon the subject.

When the claimant left Louisville it would have been illegal to take up his abode in the territory whither he was going. Such a purpose is

not to be presumed. The presumption is the other way. To be established it must be proved. 12 Moore's Privy Council, *supra.* Among the circumstances usually relied upon to establish the *animus manendi* are: Declarations of the party; the exercise of political rights; the payment of personal taxes; a house of residence, and a place of business. Phillimore, 100; Wharton, § 62, and *post.* All these indicia are wanting in the case of the claimant.

The rules of law applied to the affirmative facts, without the aid of the negative considerations to which we have adverted, are conclusive against him. His purchase of the cotton involved the same legal consequences as if it had been made by an agent whom he sent to make it. Judgment affirmed.

Section 33. — Ownership of Goods in Transit.

THE "SALLY."

Lords, 1795.

(3 *C. Robinson*, 300, *note.*)

The *Sally* was a case of a cargo of corn shipped March, 1793, by Steward and Plunket, of Baltimore, ostensibly for the account and risk of Conyngham, Nesbit & Co., of Philadelphia, and consigned to them *or their assigns:* By an endorsement of the bill of lading, it was further agreed that the ship should proceed to Havre de Grace, and there wait such time as might be necessary, the orders of the consignee of the said cargo (the mayor of Havre) either to deliver the same at the port of Havre, or proceed therewith to any one port without the Mediterranean, on freight at the rate of 5*s.* per barrel on delivery at Havre, and 5*s.* 6*d.* at a second port, the freight to be settled by the shippers in America according to agreement.

Amongst the papers was a concealed letter from Jean Ternant, the minister of the French Republic to the United States, in which he informs the minister of foreign affairs in France. "The house of Conyngham & Co., already known to the ministers, by their former operations for France, is charged by me to procure without delay, a consignment of 22,000 bushels of wheat, 8,000 barrels of fine flour, 900 barrels of salted beef from New England. The conditions stipulated are the same as those of the contract of 2d November, 1792, with the American citizens, Swan & Co., for a like supply to be made to the Antilles, namely, that the grain, flour, and beef are to be paid at the current price of the markets at the time of their being shipped; that the freights shall be at the lowest course in the

ports; that an insurance should be on the whole; and that a commission of five per cent. shall be allowed for all the merchants' expenses and fees. It has been, moreover, agreed, considering the actual reports of war, that the whole shall be sent as American property to Havre and to Nantes, with power to our government of sending the ships to other ports conditional on the usual freight. As you have not signified to me to whom these cargoes ought to be delivered in our ports, I shall provide each captain with a letter to the mayor of the place."

There was also a letter from Jean Ternant to the mayor of the municipality of Havre. "Our government having ordered me to send supplies of provisions to your port, I inform you that the bearer of this, commanding the American ship, the *Sally*, is laden with a cargo of wheat, of which he will deliver you the bill of lading."

To the 12th and 20th interrogatories the master deposed, "that he believes the flour was the property of the French government, and, on being *unladen*, *would have immediately become the property* of the French government."

In the argument it was insisted, *on the part of the claimants*, that the cargo was to be considered as the property of the American merchants; that it had been ordered by them, to be supplied and delivered at a certain place; and that under the general principle of law, property was not considered to be divested between the vendor and vendee till actual delivery.

It was contended, that the contract remained *executory* till the completion by delivery in Europe; that the payment was contingent on the completion of the contract in this form, and that no money had passed, nor any compensation or agreement had intervened to produce an absolute conversion of the property; and it was prayed that the court would admit farther proof to ascertain that circumstance.

On the part of the captors it was replied, that the general rule of law subsisting between vendor and vendee in a commercial transaction, referring only to the contracting parties, and not affecting the rights of third persons, could not apply to contracts made in time of war, or in contemplation of war, where the rights of a belligerent nation intervened; that the effect of such a contract as the present would be to protect the trade of the contracting belligerent from his enemy; and that if it could be allowed, it would put an end to all capture. It was said to be a known principle of the prize court, that neutral property must be proved to be neutral at all periods from the time of shipment, without intermission, to the

arrival and subsequent *sale* in the port of the enemy; that the twelfth and twentieth interrogatories were framed with this view to inquire, "whether on its arrival, etc., it shall and will belong to the same owner and no other, etc.," and a reference was made to the case of the Charles Havenerswerth in 1741, in which the form of attestation was directed to be prepared by the whole bar, and was established in the present form to ascertain the property at the several periods of *shipment*, and *arrival in the enemy's ports*,—in cases where affidavits were to be received to supply the defects of the original evidence, in the place of plea and proof.

The Court:—"It has always been the rule of the prize courts, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemies' property. Where the contract is made in time of peace or without any contemplation of a war, no such rule exists:—But in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. The bill of lading expresses account and risk of the American merchants; but papers alone make no proof, unless supported by the depositions of the master. Instead of supporting the contents of his papers, the master deposes, 'that on arrival the goods would become the property of the French government,' and all the concealed papers strongly support him in this testimony: The *evidentia rei* is too strong to admit farther proof. Supposing that it was to become the property of the enemy on delivery, *capture* is considered as *delivery:* The captors, by the rights of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property. On every principle on which Prize Courts can proceed, this cargo must be considered as enemy's property.

"Condemned."

THE PACKET "DE BILBOA."

High Court of Admiralty, 1799.

(2 *C. Robinson*, 133.)

Judgment,—Sir W. Scott:—

"This is a claim of a peculiar nature for goods sent by British subjects to Spain, shipped before hostilities, during the time of that

situation of the two countries, of which it was unknown, even to our government, what would be the issue between them. There appears to be no ground to say that this contract was influenced by speculations on the prospect of a war, or that anything has been specially done to avoid the risks of war. It is shown in the affidavit of the claimant 'that this is the constant habit and practice of this trade;' whether it is the practice of the Spanish trade generally, or only the particular mode of these individuals in carrying on commerce together is not material, as the latter would be quite sufficient to raise the subject of this claim. The question is, in whom is the legal title? Because, if I should find that the interest was in the Spanish consignee, I must then condemn, and leave the British party to apply to the Crown for that grace and favor which it is always ready to shew; the property being condemnable to the Crown as taken before hostilities.

"The statement of the claim sets forth that these goods have not been paid for by the Spaniard;—that would go but little way,—that alone would not do; there must be many cases in which British merchants suffer from capture, by our own cruisers, of goods shipped for foreign account before the breaking out of hostilities. It goes on to state, 'that, according to the custom of the trade, a credit of six, nine, or twelve months is usually given, and that it is not the custom to draw on the consignee till the arrival of the goods; that the sea risk in peace as well as war is on the consignor; that he insures, and has no remedy against the consignee for any accident that happens during the voyage.' Under these circumstances, in whom does the property reside? The ordinary state of commerce is, that goods ordered and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect; but that general contract of the law may be varied by special agreement or by a particular prevailing practice, that presupposes an agreement amongst such a description of merchants. In time of profound peace, when there is no prospect of approaching war, there would unquestionably be nothing illegal in contracting, that the whole risk should fall on the consignor, till the goods came into possession of the consignee. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not; it would not be at all illegal, that goods not shipped in time of war, or in contemplation of war, should be at the risk of the shipper. In time of war this cannot be permitted, for it would at once put an end to all captures at sea; the risk would in all cases be laid on the consignor, where it suited the purpose of protection; on every contemplation of a war, this contrivance would be practiced in all consignments from neutral ports to the enemy's country,

to the manifest defrauding of all rights of capture; it is therefore considered to be an invalid contract in time of war; or, to express it more accurately, it is a contract which, if made in war, has this effect; that the captor has a right to seize it and convert the property to his own use; for he having all the rights that belong to his enemy, is authorized to have his taking possession considered as equivalent to an actual delivery to his enemy; and the shipper who put it on board during a time of war, must be presumed to know the rule, and to secure himself in his agreement with the consignee against the contingence of any loss to himself that can arise from capture. In other words, he is a mere insurer against sea risk, and he has nothing to do with the case of capture, the loss of which falls entirely on the consignee. If the consignee refuses payment and throws it upon the shipper, the shipper must be supposed to have guarded his own interests against that hazard, or he has acted improvidently and without caution.

"The present contract is not of this sort; it stands as a lawful agreement, being made whilst there was neither war nor prospect of war. The goods are sent at the risk of the shipper: if they had been lost, on whom would the loss have fallen but on him? What surer test of property can there be than this? It is the true criterion of property that, if you are the person on whom the loss will fall, you are to be considered as the proprietor. The bill of lading very much favors this account. The master binds himself to the shipper, 'to deliver for you and in your name,' by which it is to be understood that the delivery had not been made to the master for the consignee, but that he was to make the delivery in the name of the shipper to the consignee, till which time the inference is that they were to remain the property of the shipper: as to the payment of freight, that is not material, as in the end the purchaser must necessarily pay the carriage. The other consideration—who bears the loss? much outweighs that,—neither does the case put shew the contrary. The case put is—supposing Spain and England both neutral and that these goods had been taken by the French and sold to great profit, to whose advantage would it have been? The answer is, if the goods were to continue the property of the shipper till delivery, it must have enured to *his* benefit, and not that of the consignee. To make the loss fall upon the shipper in the case of the present shipment would be harsh in the extreme. He ships his goods in the ordinary course of traffic, by an agreement mutually understood between the parties, and in no wise injurious to the rights of any third party; an event subsequently happens which he could in no degree provide against. If he is to be the sufferer he is

a sufferer without notice and without the means of securing himself; he was not called upon to know that the injustice of the other party would produce a war before the delivery of his goods. The consignee may refuse payment, referring to the terms of the contract which was made when it was perfectly lawful; and under what circumstances and on what principles the shipper could ever enforce payment against the consignee is not easy to discover. The goods have never been delivered in Spain; they were to have been at the risk of the shipper until delivery, and this under a perfectly fair contract. I must consider the property to reside still in the English merchant. It is a case altogether different from other cases which have happened on this subject *flagrante bello*. I am of opinion that, on all just considerations of ownership, the legal property is in the British merchant; that the loss must have fallen on the shipper, and the delivery was not to have been made till the last stage of the business, till they had actually arrived in Spain and had been put into the hands of the consignee; and therefore I shall decree restitution of the goods to the shipper."

On prayer that the captor's expenses might be paid, it was answered that they had already had the benefit of the condemnation of the ship.

Court.—"I think there has been a great service performed to the shipper. If the goods had not been captured they would have gone into the possession of the enemy. The captor did right in bringing the question before the court, and he ought by no means to be a loser. I shall not give salvage, but shall direct the expenses of the captor to be paid out of the proceeds."

THE "ANNA CATHARINA."

HIGH COURT OF ADMIRALTY, 1802.

(4 *C. Robinson*, 107.)

This was a case of a cargo of dry goods, etc., taken October, 1801, on a voyage from Hamburgh to La Guayra, and described in the ostensible papers and depositions, "as going to take the chance of the market." By the discovery of a letter, it afterwards appeared, that these goods were going under a special agreement and contract with the Spanish government of the Caracas.

Judgment. — Sir W. SCOTT: —

* * * Taking the shippers to be neutral merchants "how does the

character of the goods stand in this transaction? Was it not, in the first place, a cargo going to become the property of the Spanish government immediately on arrival? Was not the Spanish government entitled to possession? It was only on the violation of the contract, on the part of the Spanish government, that these goods were to take the chance of the market. The shippers considered themselves as bound to deliver them to the use of the Spanish government, under the agreement; as entitled to the benefit, and subject to the obligations of that contract. Were there any intermediate acts to be done after the arrival of the vessel? Or were the acts such, as would have the effect of substantially distinguishing this case from the *Sally*, and other cases? Is there any act of ownership which the claimant was at liberty to exercise, so as to prevent the delivery? If not the goods must be considered as having substantially become, *in itinere*, the property of the enemy. * * *

"It is said * * * that these goods do not exactly correspond with the enumeration in the agreement, that *they are not contract goods;* and consequently, that without any violation of public faith, the acceptance of them was merely optional and contingent. But, I cannot think, that it is now open to the parties to make this averment; when it is evident, on the face of their own letters, that they had relied on the clear and absolute obligation of the Spanish government to take them *as such.* * * *

"These distinctions are, in my judgment, totally insufficient to take the case out of the authority of the precedents alluded to. Where the goods are sent under a contract by the party, it surely cannot be permitted to the claimant himself to aver, that the goods so sent are not contract goods. * * * Under these circumstances, I am strongly disposed to hold, that this cargo was going in time of war to the port of a belligerent, there to become the property of the belligerent, immediately on arrival, and that the legal consequence of condemnation would on that ground alone attach upon it." [1]

[1] Only so much of this case is given as refers to the shipment of goods under contract to a belligerent port. — ED.

THE "SAN JOSE INDIANO."

U. S. Circuit Court for Massachusetts, 1814.

(2 *Gallison*, 268)

Story, J.: [1] —

"The next is the claim of Mr. J. Lizaur, of ——, in Brazil.

"The shipment was made by Messrs. Dyson Brothers & Co., and by the bill of lading the goods are consigned to Messrs. Dyson Brothers and Finney, Rio de Janeiro.

"The accompanying invoices express the shipment to be made by order and for account of Mr. J. Lizaur, and contain charges of freight, commission and insurance, and an acknowledgment of giving credit for three and six months. In a letter of the 4th of May, 1814, addressed by the shippers to the consignees, they say, 'for Mr. Lizaur we open an account in our books here, and debit him 1764*l.* 11*s.* 7*d.* for 16 cases of cambrics, etc., at three months' credit; we cannot yet ascertain proceeds of his hides, etc., but find his order will far *exceed amount of these shipments, therefore consign the whole to you, so as you may come to a proper understanding.* We have charged our usual commission of two and a half per cent. in the invoices, but should you have made any stipulation to the contrary, he can again bring same to our debit. Invoices, bills of lading and patterns of what goods are requisite we forward as usual in a small box to your address.'

"The single question presented in this claim is, in whom the property vested during its transit; if in Mr. Lizaur, then it is to be restored; if in the shippers, then it is to be condemned. It is contended on behalf of the claimant, that the goods, having been purchased by order of Mr. Lizaur, the property vested in him immediately by the purchase, and the contract being executed by the sale, no delivery was necessary to perfect the legal title; that nothing was reserved to the shippers, but a mere right of stoppage *in transitu*, and that if they had been burnt before the shipment, or lost during the voyage, the loss must have fallen on Mr. Lizaur.

"As to the doctrine of stoppage *in transitu*, I do not conceive it can apply to this case. That right exists in the single case of insolvency, and presupposes, not only that the property in the goods has passed to the consignee, but that the possession is in a third person

[1] Statement of case omitted and only so much of the opinion is given as relates to the question of stoppage *in transitu*. — Ed.

in their transit to the consignee. It cannot, therefore, touch a case, where the actual or constructive possession still remains in the shipper or his exclusive agents.

"I agree also to the position, that in general the rules of the prize court, as to the vesting of property, are the same as those of the common law, by which the thing sold, after the completion of the contract, is properly at the risk of the purchaser. But the question still recurs, when is the contract executed? It is certainly competent for an agent abroad, who purchases in pursuance of orders, to vest the property, immediately on the purchase, in his principal. This is the case, when he purchases on the credit of his principal, or makes an absolute appropriation and designation of the property for his principal. But where a merchant abroad, in pursuance of orders, sells either his own goods, or purchases goods on his own credit (and thereby in reality becomes the owner), no property in the goods vests in his correspondent, until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. Until that time he has in legal contemplation the exclusive property, as well as possession; and it is not a wrongful act for him to convert them to any use, which he pleases. He is at liberty to contract upon any new engagements, or substitute any new conditions in relation to the shipment. And this, I understand, not only as the general law, but as the prize law pronounced by that high tribunal, whose decisions I am bound to obey.

"In the *Venus*, 1814, on the claim of Magee and Jones, in delivering the opinion of the court, Mr. Justice WASHINGTON observed: 'to effect a change of property, as between seller and buyer, it is essential, that there should be a contract of sale agreed to by both parties, and if the thing agreed to be purchased is to be sent by the vendor to the vendee it is necessary to the perfection of the contract, that it should be delivered to the purchaser or to his agent, which the master (of a ship) to many purposes is considered to be.'

"And adverting to the facts of that claim he further says: 'The delivery of the goods to the master of the vessel was not for the use of Magee and Jones, any more than it was for the shipper solely, and consequently it amounted to nothing, so as to divest the property out of the shipper, until Magee should elect to take them on joint account, or to act as the agent of Jones.'"[1]

[1] *Semble*, that by the French rule the neutral shipper may assume the risk of goods in transit to enemy country. (The *Trois Frères*, Comité de Salut Public, An III., 1 P. et D. 357.) — ED.

Section 34. — Transfers in Transitu.

THE "VROW MARGARETHA."

High Court of Admiralty, 1799.

(1 *C. Robinson*, 336.)

Judgment,—Sir W. Scott:—

"This is a claim of Mr. Ph. Berkeymyer, of Hamburgh, for some parcels of wine which were seized on board three Dutch vessels detained by order of government in 1795. The ships have been since condemned; the cargoes were described in the ship's papers, as far as the property was expressed, as belonging to Spanish merchants. It is material, in this case, to consider the relative situation of the countries from which, and to which these cargoes were going. Spain and Holland were then in alliance with this country and at war with France; it might, therefore, be an inducement with a Spanish merchant to conceal the property of his goods, although it *does not* appear to have existed in any great degree, as the goods were coming under an English convoy, and as they were shipped 'as Spanish wines,' and destined, avowedly, to Holland; there was, therefore, nothing in this part of the case to mislead our cruisers. Mr. Berkeymyer is allowed to be an inhabitant of Hamburgh, although he had made a journey, a short time previous to the shipment of these cargoes, to Spain (where he had resided some years before), to settle his affairs, and bring off the property which he had left behind him. He had quitted Spain, however, previous to the breaking out of Spanish hostilities, and had resumed his original character of a merchant of Hamburgh. The account which he gives of his transactions in Spain, as far as they regard this case, is, that he entered into a contract with two Spanish houses for some wines, which were at the time actually shipped, and *in itinere* towards Holland. The first objection that has been taken is, that such a transfer is invalid, and cannot be set up in a Prize Court, where the property is always considered to remain in the same character in which it was shipped till the delivery. If that could be maintained there would be an end of the question, because it has been admitted that these wines were shipped as Spanish property, and that Spanish property is now become liable to condemnation. But I apprehend it is a position which cannot be maintained in that extent. In the ordinary

course of things in time of peace—for it is not denied that such a contract may be made, and effectually made (according to the usage of merchants,) such a transfer *in transitu* might certainly be made. It has even been contended that a mere delivering of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot well be doubted. When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu;* and in that sense I recognize it as the rule of this Court. But this arises, as I have said, out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace. The transfer, therefore, must be considered as not invalid in point of law, at the time of the contract; and being made before the war it must be judged according to the ordinary rules of commerce.

"It has been farther objected to the validity of this contract, that a part of the wines did actually reach Hamburgh, where they were sold, and the money was detained by the consignees in payment of the advances which they had made. It is said that this annuls the contract—to the extent of that part it may do so, and the deficiency must be made up to the purchaser by other means; but it appears that it has been actually supplied by bills of exchange, and an assignment of other wines sent to Petersburgh. It is not for me to set aside the whole contract on that partial ground, or to construe the defect in the execution of the contract so rigorously as to extend it to those wines which never went to Holland, and which never became *de facto* subject to be detained by the consignees. They are free for the contract to act upon; and if the parties are desirous of adhering to their contract in its whole extent, it does not become other persons to obstruct them.

"It comes then to a question of fact, whether it was a *bona fide* transfer or not? I think the time is a strong circumstance to prove the fairness of the transaction. Had it happened three months

later there might have been reason to alarm the prudence of Spanish merchants, and induce them to resort to the expedient of covering their property. But at the time of the contract there seems to have been no reason for apprehension, and therefore there is nothing to raise any suspicion on that point.

"The instruments of sale have been produced, and no observation has been made upon them. The correspondence has been exhibited, and there is certainly some confusion in the dates. Explanations have been given, which are probable enough; still they are but conjectural. If the counsel for the captors require it I will order the original documents in proof of these explanations to be produced; although I must say, at the same time, that the impression upon my mind is, that it is a fair transaction.

"The originals decreed to be produced.

"January 15th, 1800. The captors being satisfied with the farther proof produced, Mr. Berkeymyer's claims were restored without opposition."

THE "JAN FREDERICK."

High Court of Admiralty, 1804.

(5 *C. Robinson*, 128.)

Judgment,—Sir W. Scott:—[1]

"This question arises on parts of several cargoes put on board Dutch ships in January and February, 1803, and brought in under the general embargo on Dutch property, previous to hostilities, in the month of May. The property is documented for the account and risk of certain estates in Surinam; and certainly, if it was not allowable under any considerations to aver against the evidence of the ship's documents, it must be subject to condemnation as Dutch property. But the Court has opened a door to such claims, in opposition to the averment of the ship's papers; and it has done this, on a consideration of the fair course of mercantile speculation in time of peace. It has even allowed a change of property *in transitu*, by the transfer of the bills of lading, where it had been done without any view of accommodation to relieve the seller from the pressure or prospect of war. In the present instance, there is no proof of any transfer of the bills of lading, except as to one or two parcels of goods belonging to the widow Noble, which do, indeed, bear an en-

[1] Facts are omitted and only extracts are given from the judgment. — Ed.

dorsement, but whether they were so endorsed before or after the war, it does not appear. This alone would be sufficient to defeat the claim; since, till the bill of lading was so endorsed, the contract would, I apprehend, be a thing remaining in covenant only: it might subject the party to an action *damni dati*, but it would not amount to a transfer, being only an engagement that the goods should be transferred when they arrived. That a transfer may take place *in transitu*, has, I have already observed, been decided in two or three cases, where there had been no actual war, nor any prospect of war, mixing itself with the transaction of the parties. But in time of war this is prohibited as a vicious contract, being a fraud on belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce, of evading those rights beyond the possibility of detection. It is a road that, in time of war, must be shut up; for although honest men might be induced to travel it with very innocent intentions, the far greater proportion of those who passed would use it only for sinister purposes, and with views of fraud on the rights of the belligerent.

"This, however, is not a contract made in time of war; and therefore an important question is raised, whether the *contemplation of war* would have the same effect in vitiating these contracts as actual war? It cannot be said that all engagements in the proximity of war, into which the speculation of war might enter, as for instance, with regard to the price, would therefore be invalid. The contemplation of war is undoubtedly to be taken in a more restricted sense. But if the contemplation of war leads immediately to the transfer, and becomes the foundation of a contract, that would not otherwise be entered into on the part of the seller; and this is known to be so done, in the understanding of the purchaser, though on his part there may be other concurrent motives, as in the case of the *Rendsborg* (4 C. Rob., 121), such a contract cannot be held good, on the same principle that applies to invalidate a transfer *in transitu* in time of actual war. The motive may indeed be difficult to be proved —but that will be the difficulty of particular cases. Supposing the fact to be established, that it is a sale under an admitted necessity, arising from a certain expectation of war; that it is a sale of goods not in the possession of the seller, and in a state where they could not, during war, be legally transferred, on account of the fraud on belligerent rights. I cannot but think that the same fraud is committed against the belligerent, not, indeed as an actual belligerent, but as one who was, in the clear expectation of both the contracting parties, likely to become a belligerent before the arrival of the property, which is made the subject of their agreement. The nature of both

contracts is identically the same, being equally to protect the property from capture of war—not indeed in either case from capture at the present moment when the contract is made, but from the danger of capture, when it was likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis. In other words, both are done for the purpose of eluding a belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi*, and are, in my opinion, justly subject to the same rule. * * *

"I am of opinion, therefore, that if the papers and letters which have been produced, do sufficiently establish the purpose attributed to the contract, if it is proved to have been built immediately and fundamentally on the contemplation of war, on the part of the seller, and that it would not otherwise have fallen into the hands of the purchaser, it is an illegal contract, and must be held on every ground, on which similar contracts in time of war have been held to be invalid. * * *

"But taking it to be a *bona fide* contract, yet being formed *in transitu*, for the purpose of withdrawing the property from capture, it does intimately partake of the nature of those contracts, which have, in the repeated decisions of this, and of the Supreme Court, been pronounced null and invalid; and I pronounce this property subject to condemnation."

THE SHIP "ANN GREEN."

U. S. Circuit Court for Massachusetts, 1812.

(1 *Gallison*, 274.)

Story, J.:[1] —

"It has been further argued, that this capture, being made while the property was *in transitu*, and war intervening, it is to be considered as enemy's property, because it would have become such upon arrival at the port of destination: and at all events it would have been liable to seizure and confiscation. As to the fact that the property was taken *in transitu*, I do not perceive how of itself it can affect the rights of the parties either way; nor do I perceive how this property was to have become enemy's property on its arrival. The case proved is, that it was American property consigned for sale

[1] Statement of the case is omitted and only so much of the opinion is given as relates to transfer *in transitu*. — Ed.

only, and not a consignment where the property was, at the time of shipment or of arrival, to belong to the consignee. The cases are, as I think, settled upon just principles, that decide that in time of war, property shall not be permitted to change character in its transit; nor shall property consigned, to become the property of the enemy on arrival, be protected by the neutrality of the shipper. Such contracts, however valid in time of peace, are considered, if made in war or in contemplation of war, as infringements of belligerent rights, and calculated to introduce the grossest frauds. In fact, if they could prevail, not a single bale of enemy's goods would ever be found upon the ocean." (*Vrow Margaretha*, 1 C. Rob., 336; *Carl Walter*, 4 C. Rob., 207; *Jan Frederick*, 5 C. Rob., 128; The *Constantia*, 6 C. Rob., 321; The *Anna Catharina*, 4 C. Rob., 107; Packet *De Bilboa*, 2 C. Rob., 133.)[1]

THE "BENITO ESTENGER."

Supreme Court of the United States, 1899

(176 *United States*, 568)

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

If the alleged transfer was colorable merely, and Messa was the owner of the vessel at the time of capture, did the District Court err in condemning the *Benito Estenger* as lawful prize as enemy property?

"Enemy property" is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law. The general rule is that in war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership. And by the law of prize, property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal

[1] In the case of the ship *Francis and Cargo*, 1813, 1 Gallison, 445, approved by the Supreme Court, 8 Cranch, 354 (1813), a shipment made by an enemy shipper to his correspondent in America, to belong to the latter at his election, in twenty-four hours after the arrival thereof, was held liable to condemnation as hostile property.

In war, property cannot change its character *in transitu*; and in this case, an election during the transit would not merge the hostile character of the property.

On the subject of the sale *in transitu* by a belligerent to a neutral, see an article by T. S. M. Browne, in the Law Magazine and Review, 1870, Vol. xxix. p. 233. — Ed.

traffic stamps it with the hostile character and attaches to it all the penal consequences. *Prize Cases*, 2 Black, 635, 674; *The Sally*, 8 Cranch, 382, 384; *Jecker* v. *Montgomery*, 18 How. 110; *The Peterhoff*, 5 Wall. 28; *The Flying Scud*, 6 Wall. 263.

Messa was a Spanish subject, residing at Santiago, and for years engaged in business there. His vessel had a Spanish crew and Spanish officers, and he testified that he was on board of her as supercargo. She had the Spanish flag in her lockers, though she was flying the British flag at the moment, under a transfer, which, as presently to be seen, was colorable and invalid. There was evidence tending to show that Messa sympathized with the Cuban insurgents, but no proof that he was himself a Cuban rebel or that he had renounced his allegiance to Spain. The vessel carried to Manzanillo on this voyage a cargo of provisions, consisting principally of eleven hundred barrels of flour.

Manzanillo was a city of several thousand inhabitants and the first important place on the south Cuban coast between Santiago and Cienfuegos, lying inside the bay formed by the promontory which Cape Cruz terminates, and about sixty miles northeast of the cape. Cape Cruz is about due north from Montegro Bay on the northwestern shore of Jamaica, and about seventy-five miles distant, while Kingston is on the southeastern coast of Jamaica. The record lacks evidence of the condition of affairs there at that time, but official reports leave no doubt that it was defended by several vessels of war and by shore batteries, and was occupied by some thousands of Spanish soldiers. On the 6th of April, 1898, the Secretary of the Navy had instructed Admiral Sampson, among other things, that the department desired, "That in case of war, you will maintain a strict blockade of Cuba, particularly the ports of Havana, Matanzas, and, if possible, Santiago de Cuba, Manzanillo and Cienfuegos." Manzanillo was the terminus of a cable which connected with Santa Cruz, Trinidad, Cienfuegos and Havana, and was subsequently cut by the forces of the United States, in order to check the inland traffic with Manzanillo and to prevent the calling of re-enforcements to resist the capture of that place. And it appeared that Admiral Sampson had been for some weeks endeavoring to stop blockade running on the south coast of Cuba, and that a large vessel with a heavy battery was stationed at Cape Cruz. Manzanillo was not declared blockaded, however, until the proclamation of June 27, 1898; but the consul of the United States at Kingston had warned Messa and Beattie that a blockade in fact existed. The claimant testified that the vessel was chartered by Flouriache, a Cuban merchant, and that the cargo was consigned to Bauriedel and Company, at Manzanillo. The deposition

of neither of these was taken. According to the explicit testimony of the consul, he was informed by both the claimant and his brother that the flour was transferred by Bauriedel and Company, through a communicating way from their warehouse to the Spanish Government warehouse, immediately upon its delivery; and no evidence to contradict this was introduced.

The instructions of the Navy Department to "blockading vessels and cruisers," in the late war, included, among articles conditionally contraband, "provisions, when destined for an enemy's ship or ships, or for a place that is besieged."

In *The Commercen*, 1 Wheat. 382, 388, Mr. Justice Story said: "By the modern law of nations provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. * * * If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband."

In *The Jonge Margaretha*, 1 C. Rob. 189, 193, Sir William Scott discussed this question, and, after referring to many instances, concluded: "And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it."

But, while alluding to this subject by way of illustration, we do not feel called on to consider under what particular circumstances, generally speaking, provisions may be held contraband of war. It is enough that, in dealing with a vessel adjudicated to have been an enemy vessel, the fact of trade with the enemy, especially in supplies necessary for the enemy's forces, is of well-nigh decisive importance.

In reply it is suggested that this cargo was intended for the Cuban insurgents, and a quotation is made from a letter of the consul to the effect that he had been "told privately by the president of the local junta, who has performed valuable services for me, that the proceeds of this cargo are to be forwarded to the Cuban Government and troops through the Cuban agent at Manzanillo." The suggestion derives no support from the record, and the facts remain that the provisions were delivered to the Spanish Government, and that the trade to this Spanish stronghold constituted, under the laws of war, illicit intercourse with the enemy.

This brings us to consider the contention that Messa had rendered important services to the United States; that he was the friend and

not the enemy of this government, and that there was an agreement between him and the United States consul which operated to protect the vessel from capture. But Messa's status was that of an enemy, as already stated, and this must be held to be so notwithstanding individual acts of friendship, certainly since there was no open adherence to the Cuban cause, and allegiance could have been shifted with the accidents of war. The legal conclusion was not affected by the fact that Messa had, in cultivating friendly relations with the consul, given the latter an old government plan of the province of Santiago and an especially prepared chart of the harbor. Thus displaying his amicable inclinations, he endeavored to obtain from the consul a letter of protection for the voyage he was about to undertake, but this the consul declined to furnish, and informed him at the same time that Manzanillo was blockaded, and that the contemplated venture would be at his own risk.

Nevertheless, the consul agreed to write the admiral, and did write him, June 23, that Messa offered to give certain information that might be valuable, and that he proposed to be off Cape Cruz on June 30, when he could be picked up there and taken to the admiral if he desired; but the consul said: "You quite understand that in dealing with those people, one is always more or less liable to imposition. I therefore make no recommendation of Messa to you." There was nothing to show that the voyage was undertaken on the strength of this letter or that it in any way contributed to the capture, nor that the admiral intended to avail himself of the suggestion in regard to Messa.

The claimant asserted and the consul denied that protection to the voyage was extended by the latter. But we do not go at length into this matter because we think that no engagement with the United States nor any particular service to the United States was made out in that connection, and so far as appears the vessel was captured in the ordinary course of cruising duty at a time and under circumstances when her liability was not to be denied. Moreover, a United States consul has no authority by virtue of his official station to grant any license or permit the exemption of a vessel of an enemy from capture and confiscation. This was so held by Judge McCaleb in *Rogers* v. *The Amado*, Newberry, 400, in which he quotes the language of Sir William Scott in *The Hope*, 1 Dodson, 226, 229: "To exempt the property of enemies from the effect of hostilities, is a very high act of sovereign authority; if at any time delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are termed *mandatories*

or by persons in whom such a power is vested in virtue of any official situation to which it may be considered incidental. It is quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. '*Ei rei non præponitur;*' and therefore his acts relating to it are not binding."

In *The Joseph*, 8 Cranch, 451, the vessel was condemned for trading with the enemy, and it was held that she was not excused by the necessity of obtaining funds to pay the expenses of the ship, nor by the opinion of an American minister expressed to the master, that by undertaking the voyage he would violate no law of the United States. The court said that these considerations, "if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this court to admit as the basis of its decision."

This is equally true of the case before us, for even if the circumstances may have justified liberal treatment, that cannot be permitted to influence our decision. It belongs to another department of the Government to extend such amelioration as appears to be demanded in particular instances.

Neither the case *Les Cinq Frères*, 4 Lebau's Nouveau Code des Prises, 63, nor that of *The Maria*, 6 C. Rob. 201, cited by counsel, is in point. In the former, the Committee of Public Safety in the year 3 of the French calendar of the Revolution decreed the condemnation of *Les Cinq Freres* as an enemy's vessel, and of her cargo, although belonging to Frenchmen, but further decreed restitution of the cargo or its value, as matter of grace, in consideration of services rendered by the claimants in furnishing provisions to the republic, adding that this should not be drawn into a precedent. The latter simply involved the interpretation of an indulgence specifically granted by the British Government.

Thus far we have proceeded on the assumption that the transfer of the *Benito Estenger* was merely colorable, and this, if so, furnished in itself ground for condemnation. A brief examination of the evidence, in the light of well-settled principles, will show that the assumption is correct.

Messa's story of the transfer was that the steamer had been owned by Gallego, Messa and Company, and then by himself; that he was compelled to sell in order to get money to live on; that he made the sale for $40,000, for which, or a large amount of which, credit was given on an indebtedness of Messa to Beattie and Company, and that he was employed by Beattie to go on the vessel as his representative and business manager.

In short, the statements as to price were conflicting; the reason assigned for the sale was to get money to live on, and yet apparently

no money passed, and Messa said that he received credit for a large part of the consideration on indebtedness to claimant's firm; claimant himself refused to describe the payment or payments; the Spanish master and crew remained in charge; Messa went on the voyage as supercargo; the vessel continued in trade, which, in this instance, at least, appeared to be plainly trade with the enemy; and, finally, it is said by claimant's counsel in his printed brief: "It will not be contended upon this appeal that all the interest of Mr. Messa in the *Benito Estenger* ceased on June 9, 1898. The transfer was obviously made to protect the steamer as neutral property from Spanish seizure. That Mr. Messa, however, still retained a beneficial interest after this sale and transfer of flags, and continued to act for the vessel as supercargo, has not been disputed."

The attempt to break the force of this admission by the contention that the change of flag was justifiable as made to avoid capture by the Spanish is no more than a reiteration of the argument that Messa was a Cuban rebel, and his vessel a Cuban vessel, which, as has been seen, we have been unable to concur in. If the transfer were invalid, she belonged to a Spanish subject, she was engaged in an illegal venture, and her owner cannot plead his fear of Spanish aggression.

Transfers of vessels *flagrante bello* were originally held invalid, but the rule has been modified, and is thus given by Mr. Hall, who, after stating that in France "their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of the war," says: "In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war." International Law (4th ed.), 525. And to the same effect is Mr. Justice Story in his Notes on the Principles and Practice of Prize Courts (Pratt's ed.), 63; 2 Wheat. App. 30: "In respect to the transfers of enemies' ships during the war, it is certain that purchases of them by neutrals are not, in general, illegal; but such purchases are liable to great suspicion; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral claim; * * * and if after such transfer the ship be employed habitually in the enemy's trade, or under the management of a hostile proprietor,

the sale will be deemed merely colorable and collusive. * * * Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether."

The Sechs Geschwistern, 4 C. Rob. 100, is cited, in which Sir William Scott said: "This is the case of a ship asserted to have been purchased of the enemy; a liberty which this country has not denied to neutral merchants, though by the regulation of France it is entirely forbidden. The rule which this country has been content to apply is, that property so transferred must be *bona fide* and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest, vitiates a contract of this description altogether."

In *The Jemmy*, 4 C. Rob. 31, the same eminent jurist observed: "This case has been admitted to farther proof, owing entirely to the suppression of a circumstance, which if the court had known, it would not have permitted farther proof to have been introduced; namely, that the ship has been left in the trade, and under the management of her former owner. Wherever that fact appears, the court will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises, that it is merely a covered and pretended transfer. The presumption is so strong that scarcely any proof can avail against it. It is a rule which the court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship, and yet retain the management of it, as a neutral vessel, it would be impossible for the court to protect itself against frauds."

And in *The Omnibus*, 6 C. Rob. 71, he said: "The court has often had occasion to observe, that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, not all the swearing in the world will convince it that it is a genuine transaction."

The rule was stated by Judge Cadwalader of the Eastern District of Pennsylvania thus: "The rule of decision in some countries has been that, as to a vessel, no change of ownership during hostilities can be regarded in a prize court. In the United States, as in England, the strictness of this rule is not observed. But no such change of property is recognized where the disposition and control of a vessel continue in the former agent of the former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile." *The Island Belle*, 13 Fed. Cases, 168.

So in *The Baltica*, Spinks Prize Cases, 264, several vessels had been sold by a father, an enemy, to his son, a neutral, immediately before the war, and only paid for in part, the remainder to be paid out of

the future earnings thereof; and the *Baltica*, which was one of them, was condemned on the ground of a continuance of the enemy's interest.

In *The Soglasie*, Spinks Prize Cases, 104, Dr. Lushington held the *onus probandi* to be upon the claimant, and made these observations: "With regard to documents of a formal nature, though when well authenticated they are to be duly appreciated, it does not follow that they are always of the greatest weight, because we know, without attributing blame to the authorities under which they issue, they are instruments often procured with extraordinary facility. What the court especially desires is, that testimony which bears less the appearance of formality, — evidence natural to the transaction, but which often carries with it a proof of its own genuineness; the court looks for that correspondence and other evidence which naturally attends the transaction, accompanies it, or follows it, and which when it bears upon the face of it the aspect of sincerity, will always receive its due weight."

In *The Ernst Merck*, Spinks Prize Cases, 98, the sale was to neutrals of Mecklenburg shortly before the breaking out of war, and it was ruled that the *onus* of giving satisfactory proof of the sale was on the claimant, and without it the court could not restore, even though it was not called on to pronounce affirmatively that the transfer was fictitious and fraudulent. In that case the vessel was condemned partly because of absence of proof of payment, Dr. Lushington saying: "We all know that one of the most important matters to be established by a claimant is undoubted proof of payment."

To the point that the burden of proof was on the claimant see also *The Jenny*, 5 Wall. 183; *The Amiable Isabella*, 6 Wheat. 1; *The Lilla*, 2 Cliff. 169; Story's Prize Courts, 26.

We think that the requirements of the law of prize were not satisfied by the proofs in regard to this transfer, and on all the evidence are of opinion that the court below was right in the conclusion at which it arrived.

Decree affirmed.

Mr. Justice Shiras, Mr. Justice White and Mr. Justice Peckham dissented.[1]

[1] It would seem that a slight inaccuracy has crept into the reported judgment of the learned Chief Justice; for *The Baltica*, 1855, Spinks P. C. 264, was reversed on appeal, 11 Moore P. C. 1857, 141, where it was held by Rt. Hon. T. Pemberton Leigh, affirming *The Ariel*, 1857, 11 id. 119, that the sale of a ship absolutely and *bona fide* by an enemy to a neutral, *imminente bello*, or even *flagrante bello*, is not illegal. In the case of *The Ariel* part only of the purchase money was paid at the time of the pur-

Section 35. — Freight and Liens.

THE "VROW HENRICA."

High Court of Admiralty, 1803.

(4 *C. Robinson*, 343.)

This was a case of a Danish vessel taken on a voyage from Valencia to London. The ship had been restored with freight to be a charge on the cargo, which was condemned, but the proceeds not being sufficient to pay the freight and the expenses of the captor, it

chase, the remainder being agreed to be paid out of the earnings of the ship. Before all the stipulated price was paid, the ship was seized in a British port as prize, and condemned in the High Court of Admiralty, on the ground that the enemy's interest in the ship was not divested, as the residue of the purchase money was to be paid out of the earnings. Such condemnation was reversed on appeal, as the non-payment of part of the purchase money did not create a lien on the freight and ship in favor of the seller, so as to render the ship in possession of a neutral owner liable to seizure by a belligerent. It was further held that liens, whether in favor of a neutral or an enemy's ship, or in favor of an enemy or a neutral ship, are equally to be disregarded in a court of prize.

In the case of *The Baltica*, the vessel was at the time of the sale in the prosecution of a voyage from Libau, an enemy's port, to Copenhagen, a neutral port, where she arrived and was taken possession of by the purchaser. It was held, reversing Dr. Lushington's judgment in Spinks, 264, that the sale, though *in transitu*, was valid, as the *transitus* had ceased when the vessel had come into possession of the purchaser, which took place before the seizure. It was further held that a neutral, while war is imminent, or even after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid whether the subject of it be lying in a neutral or an enemy's port.

See, also, *The Georgia*, 1863, 7 Wall. 32, citing with approval Rt. Hon. T. Pemberton Leigh's judgment in *The Baltica*, and holding that a *bona fide* purchase for a commercial purpose by a neutral, in his own home port, of a ship of war of a belligerent that had fled to such a port in order to escape from enemy vessels in pursuit, but which was *bona fide* dismantled prior to the sale and afterwards fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent.

Perhaps the inexorable rule of law against transfers *in transitu*, unless (as Mr. Hall expresses it, in his Int. Law, p. 526), "the transferee has actually taken possession" is nowhere better put than by Mr. Justice Swayne in delivering the opinion of the court in *The Sally*, 1865, 3 Wall. 451, 460: "The ownership of property in such cases cannot be changed while it is *in transitu*. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and anything done thereafter, designed to incumber the property, or change its ownership, is a nullity. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the

was prayed on the part of the neutral ship, that the priority of payment might be given to freight, on the authority of the *Bremen Flugge*, 4 C. Rob., 90.

Judgment,—Sir W. Scott:—

"I have considered the cases which I directed to be looked up, and I see no reason to alter the opinion which I before expressed, that freight is, in all ordinary cases, a lien which is to take place of all others. The captor takes *cum onere:* It is the allowed privilege of neutral trade to carry the property of the enemy, subject to its capture, and to the temporary detention of his vessel; and if the party does not prevaricate, or conduct himself in any respect with ill-faith, he is entitled to his freight. This is the rule which I am disposed to apply in all cases of neutral ships carrying on their ordinary commerce. It is the *general* rule, which may nevertheless be liable to be altered by circumstances. There is one class of cases to which I think it *ought not* to be applied—I mean the case of ships carrying on a trade between ports of allied enemies—a trade which may be said to arise in a great measure out of the circumstances of war, though not altogether: I say not altogether, because such a trade exists in a limited degree in times of peace.

"In such a course of trade, although the Court has not altogether refused freight to the neutral ship, yet it may not think it unreasonable that the captor should, in preference, be entitled to his expenses, inasmuch as the nature of such a trade cannot but very much influence the judgment which he must unavoidably form of his duty to bring in the cargo for adjudication. In the present case, the voyage is not between the ports of allied enemies, but between the ports of two belligerents, from Valencia to London; that constitutes, I think, a sort of middle case, with respect to the obligation by which the captor might conceive himself bound to bring the cargo to adjudication. There might be a presumption, undoubtedly, that the property belonged to the enemy exporter; but there is a foundation also for presuming that it might belong to the consignee, and that it would not have been sent on a destination to this country, but under the protection of a license.

"It is, therefore, a case of a mixed nature, to which I shall apply

enemy. It was diverted from its course by the capture. The allegation of a lien wears the appearance of an afterthought. It strikes us as a scheme devised under pressure, to save, if possible, something from the vortex which it was foreseen inevitably awaited the vessel and cargo."

On the question of colorable transfer in war, see, also, *The Texan Star*, 3 Moore Int. Arb. 2360, and cases there cited. — Ed.

a sort of a middle judgment. I will allow the captor his law expenses, and direct the other expenses to be postponed to the payment of freight."

THE "FORTUNA."

HIGH COURT OF ADMIRALTY, 1802.

(4 *C. Robinson*, 278.)

This was a case on petition of the captors, praying to be allowed freight for a cargo, which had been restored as neutral property. The demand for freight was founded on a suggestion, that the ship, which had been condemned, had actually performed the contract of the original affreightment, by carrying the cargo to the place of its destination.[1]

Judgment,—Sir W. SCOTT:—

"This is the case of a ship which had carried a cargo of corn to Lisbon, the original port of destination. In such a case I apprehend the rule to be, that the captor *is* entitled to freight, and on the same principle, on which he would be held *not to be* entitled, where he does *not* proceed, and perform the original voyage. The specific contract is performed in the one case, and not performed in the other. It is the rule of practice laid down in the case of the *Vreyheid*, Lords, 1784, a case perfectly within my recollection as a case very deliberately considered at the Cockpit. It is conformable to the text law, and the opinion of eminent jurists. 'Quod additur de vecturæ pretüs solvendis (says Bynkershoek), ejus juris rationem non adsequor. Satis intelligo, qui navem hostilem occupant, etiam occupasse omne jus quod navi, sive navarcho debebatur, ob merces translatas in portum destinatum. Proponitur autem, navem in ipso itinere fuisse captam. Eccur igitur capienti solvam mercedes? Si qui cepit navem, eam cum mercibus in locum destinatum perducere paratus sit, ejus juris rationem intelligerem, ceteroquin non intelligo.'

"In the case of the *Vreyheid*, all the considerations that could be applied to this question were fully canvassed, and it was then recognized as the true rule, that the captor *who has performed* the contract of the vessel is, as a matter of right, and *de cursu*, entitled to freight; although, if he has done anything to the injury of the property, or has been guilty of any misconduct, he may remain answer-

[1] The statement has been shortened and part of the opinion is omitted. — ED.

able for the effect of such misconduct, or injury, in the way of a set-off against him.

"The case then is reduced to a question, whether the captor, in this instance, *has* done anything to forfeit the right, which, under the general rule, he had acquired. * * *

"Under the circumstances of this case, I am of opinion, that the captor has not forfeited the interest which he had acquired.

"Freight decreed to the captor." [1]

THE "ANTONIA JOHANNA."

Supreme Court of the United States, 1816.

(1 *Wheaton*, 159.)

A neutral ship was chartered for a voyage from London to St. Michaels, thence to Fayal, thence to St. Petersburg or any port in the Baltic, and back to London, at the freight of 1,000 guineas. On her passage to St. Michaels she was captured and brought into the port of Wilmington, N. C., for adjudication. A part of the cargo was condemned, and part restored.[2]

Story, J., delivered the opinion of the court.

"The next inquiry is, as to the freight decreed to the master. As no appeal was interposed to the decree of the District Court, allowing the whole freight for the whole voyage, the question, whether more than a *pro rata* freight was due (a question which would otherwise have deserved grave consideration), does not properly arise. The only discussion which can now be entertained is, whether the freight so decreed ought not to have been charged upon the whole cargo, instead of being charged upon a portion of it. And we are all of opinion that it was properly a charge upon the whole cargo. Although capture be deemed, in the prize courts, in many cases, equivalent to

[1] Compare *The Diana*, 1803, 5 C. Rob. 67, and *Vrow Anna Catharina*, 1806, 6 C. Rob. 269, in which the special circumstances of *The Diana* are explained; the rule of the text affirmed and restated and the rule *pro rata itineris* rejected. In *Palmer* v. *Lorillard*, 1819, 16 Johns. 348, it was held by Chancellor Kent that a contract of affreightment is not dissolved by a hostile blockade or investment of the port of departure; the performance of it is merely suspended and the shipowner may detain the goods until he can prosecute the voyage with safety or the freighter demand them on tendering the full freight. It is only when the voyage is broken up, on the part of the shipowner or master, or the completion of it has become unlawful, that the contract is dissolved. See, also, *The Commercen*, 1816, 1 Wheat, 382, *infra*. — Ed.

[2] Statement by the editor and only so much of the judgment is given as relates to the question of freight. — Ed.

delivery, yet the captors cannot be liable for more than the freight of the goods actually received by them. The capture of a neutral ship, having enemy's property on board, is a strictly justifiable exercise of the rights of war. It is no wrong done to the neutral, even though the voyage be thereby defeated. The captors are not, therefore, answerable *in pœnam* to the neutral for the losses which he may sustain by a lawful exercise of belligerent rights. It is the misfortune of the neutral, and not the fault of the belligerent. By the capture, the captors are substituted in lieu of the original owners, and they take the property *cum onere*. They are, therefore, responsible for the freight which then attached upon the property, of which the sentence of condemnation ascertains them to be the rightful owners succeeding to the former proprietors. So far the rule seems perfectly equitable; but to press it farther, and charge them with the freight of goods which they have never received, or with the burden of a charter party into which they have never entered, would be unreasonable in itself, and inconsistent with the admitted principles of prize law. It might, in a case of justifiable capture, by the condemnation of a single bale of goods, lead the captors to their ruin by loading them with the stipulated freight of a whole cargo."

Decree affirmed, except as to the freight.[1]

DAVIS, J., in *Hooper, Adm'r,* v. *U. S.*, 1887, 22 Court of Claims, 408, 460. In case of capture the general rule is that the neutral carrier of enemy's property is entitled to his freight (Story, J., in *The Comerceen*, 1 Gallison, 264). Sir William Scott held very firmly by this rule in the case of *Der Mohr*, 3 C. Rob. 129, and 4 C. Rob. 315, a case

[1] It has been held that the charter-party is not the measure by which the captor is, in all cases, bound, even where no fraud is imputed to the contract itself. When, by the events of war, navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not, necessarily, bound to that inflamed rate of freight. When no such circumstances exist, when a ship is carrying on an ordinary trade, the charter-party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo, and takes with that specific lien upon it. But a very different rule is to be applied, when the trade is subjected to very extraordinary risk and hazard, from its connection with the events of war, and the redoubled activity and success of the belligerent cruisers. *The Twilling Riget*, 1804, 5 Rob. 82.

See the ship *Nathaniel Hooper*, 3 Sumn. 1839, 549, where there is an elaborate review of authority that the doctrines of prize courts, in the administration of prize law as to freight, are not generally applicable to cases of mere civil commercial ventures, or cases of civil salvage. See, also, 3 Kent's Com. 249; Carver's Carriage of Goods by Sea (3d ed. 1900), §§ 236, 237, 244-247, and cases cited in the rules to these sections. — ED.

of great hardship, appealing strongly to the sympathy of the court. In that case he said:

"In an unfortunate case like the present, the court would certainly be disposed to give the captor all possible relief. I need not add that no relief is possible which cannot be given consistently with the justice due to the claimant. The demand of freight is, I apprehend, an absolute demand, in cases where the ship is pronounced to be innocently employed. * * * The freight is as much a part of the loss as the ship, for he (the captor) was bound to answer equally for both. The captor has, by taking possession of the whole cargo, deprived the claimant of the fund to which his security was fixed. He was bound to bring in that cargo subject to the demand for freight. He was just as answerable for the freight of the voyage as for the ship which was to earn it, or which was rather to be considered as having already earned it. In the room of this fund the captor has substituted his own responsibility, for loss accrues by the fault of his agent. I see no distinction under which I can pronounce that the claimant is not as much entitled to the freight as to the vessel." See, also, 1 Gallison, 274, the *Anna Green.*

Upon an open insurance policy gross freight is recoverable, 2 Phillips Ins. § 1238. As to insurance, the inchoate right to freight vests directly "the ship has broken ground on the voyage described in the charter-party," and there is an insurable interest "where there is an expectancy coupled with a present existing title." *Lucena* v. *Crawford*, 2 Bos. and Pull. N. R. 269; 1 Phillips Ins., § 334, p. 192.

Freight, then, is properly insurable and collectible. It has value, though the right as against the freighter may be inchoate until delivery. As to the freighter the shipowner is without redress, unless there be delivery in accordance with the contract, but as to an insurer or tort-feasor, there is a right to redress upon the happening of an interruption of the voyage. The amount of that redress and the method of computing it in the cases now submitted to us of illegal capture are now to be decided. The shipowner has a right to a reasonable return upon his investment, for the risk to which his property is subjected, for its depreciation while engaged in the undertaking, and for the expenses to which he is subjected in carrying it out. The measure of that return, based upon the theory of a complete voyage, he has himself fixed in his contract of affreightment. If his voyage be not completed, but be interrupted and his property be lost by the act of a wrongdoer, then, as against that wrongdoer, the maxim *restutio in inte grum* applies. If the voyage were completed the difficulty would not be serious, for as a guide we should have a contract made by parties opposed in interest and familiar with the

business. As the voyage has not been completed, an allowance of gross freight would be more than a *restitutio in integrum*, and would neglect a deduction for expenses necessarily to be incurred in completing the contract and in conveying the cargo to the point of delivery. To allow gross freight under these circumstances would in effect not merely reimburse the owner, but render the seizure a matter of profit to him, and we do not understand that punitive damages should be recovered in the cases now before us. The vessel having been destroyed before the completion of the voyage, has not been so long employed as the contract contemplated, her crew have received less wages, and her hull and outfit have received less deterioration. She has only earned freight *pro tanto*. On the other hand, the expenses of freight earning are much greater at the beginning of the voyage than at any other period, for then advances are made seamen, stores are shipped, port charges and the cost of loading have to be met. Therefore to divide the total freight by the number of days out of port would not be fair to the shipowner; to deduct from the total freight the cost of the voyage from the place of destruction to port of destination would be a fairer rule, could those expenses be ascertained.

To compute the amount of this freight in each instance is practically impossible, so that the court is forced to the adoption of some general rule which in our opinion is a fair result. The difficulty is not a novel one, and the method of solution not without precedent. Those familiar with the proceedings of prize courts know that a substantially arbitrary rule is there often adopted in practice to enforce justice, and now, nearly a hundred years after the events from which these claims arise, when all witnesses are dead and many records destroyed, we are forced to this course, and it is evidently impossible to estimate in every instance precisely the proportion of freight earned. Where such an estimate can be made we shall make it, in other cases we shall adopt a general rule.

In seeking for such a rule, we learn that in commercial cities, in the adjustment of average losses, there is a practice to award arbitrarily two-thirds of the full freight on the immediate voyage. This course was in effect followed by the commissioners under the treaty of 1831 with France, who made a similar allowance as a fair measure of the increase in value of the cargo by reason of the distance to which it had been transported at the time of capture; and the award was made to the shipper if he had paid freight; to the shipowner if the freight had not been paid.

After carefully examining the cases before us we conclude that this rule is substantially just, and we adopt it.

This brings us to another point. The *Nancy* was under charter for a round voyage — Baltimore to Jamaica and return. She was destroyed on the outward voyage. Is she entitled to an allowance for freight based upon the entire contract contained in the charter-party?

As against an insurer or tort-feasor the inchoate right to freight vests when the vessel breaks ground "on the voyage described in the charter-party" (*supra*). An insurable interest in freight cannot spring from a mere "expectancy," but may spring from an "expectancy" when this is coupled with "a present existing title." *Lucena* v. *Crawford*, *supra*.

In cases of general average for jettison, Lowndes states the rule to be that "when a ship is chartered to fetch or carry a cargo belonging to the charter, the freight under the charter must contribute to the general average, whether or not the cargo is on board the ship at the time of the general average act, since the loss of the chartered ship, whether laden or not, would deprive the shipowner of his expected freight." Lowndes, on General Average, 236.

It has been held in this country that where a gross sum was to be paid as freight for a voyage out and return, the principal object of the voyage being to obtain a return cargo, the freight for the whole trip must contribute to general average on the outward voyage. *The Mary*, 1 Sprague's Decisions, 17. The same rule has been adopted in cases of salvage. *The Nathaniel Hooper*, 3 Sumner, 542; *The Progress*, Edwards, 210; *The Dorothy Foster*, 6 C. Rob. 88; see, also, *Livingston* v. *Columbia Insurance Company*, 3 Johns. (N. Y.), 49; *Hart* v. *Delaware Insurance Company*, 2 Wash. C. C. 346.

The decisions on this question in the United States do not go so far as those in England, but we lean to the doctrine of Sir William Scott and Dr. Lushington, as better applicable to the cases now before us, that when a vessel is actually under contract for a voyage from one port to another, thence to proceed to a third, she has such "a present existing title" in the freight money of the entire voyage as to authorize a recovery based upon the total freight money for the round trip.

Of course she is not entitled to gross freight, and we must not be understood as intending any application of this principle to a vessel proceeding under a mere "expectancy" of finding her cargo at her first port of call. The principle only covers those cases where there is an assurance of freight from her first port of call to her second, and a price stipulated to be paid therefor.

THE "CARLOS F. ROSES."

SUPREME COURT OF THE UNITED STATES, 1899.

(177 *United States*, 655.)

Mr. Chief Justice FULLER,[1] delivered the opinion of the court.

The President's proclamation of April 26, 1898, declared the policy of the government in the conduct of the war would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: "Neutral goods not contraband of war are not liable to confiscation under the enemy's flag."

The question is whether this cargo when captured was enemy property or not. The district court held that both the title and right of possession were in these neutral claimants at the time of the capture, "as evidenced by the indorsed bills of lading and the paid bills of exchange," and, therefore, entered the decree in claimant's favor. As the vessel was an enemy vessel the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary. The burden of proving ownership rested on claimants. *The London Packet*, 5 Wheat. 132; *The Sally Magee*, 3 Wall. 451; *The Benito Estenger*, 176 U. S. 568.

Further proofs on claimant's behalf were ordered to be furnished within sixty days from June 2; and the time was enlarged to August 31; and again to October 15. The proofs tendered were three affidavits of claimants' manager sworn to September 27, October 12 and October 21, 1898, respectively, with accompanying papers. Such *ex parte* statements, where further proofs have been ordered, though admitted without objection, are obviously open to criticism, but without pausing to comment on these in that aspect, we inquire whether they satisfy the requirements of the law of prize in respect of the establishment of the neutral character of this cargo under the circumstances.

Gibernau and Company were citizens of a neutral state; they were evidently commission merchants, and in each invoice a charge for their commission on the shipment appears. The invoices expressly provided that the goods were shipped "to order for account and risk and by order of the parties noted below." The consignees noted below in the invoice of the jerked beef were the owners of the vessel, "the expedition or voyage of the *Carlos F. Roses*" and "Mr. Pedro Pagés of Havana," all Spanish subjects. The consignees of the garlic were "Mr. Pedro Pagés" and the undersigned; that is, Gibernau

[1] Statement of the facts is omitted. — ED.

and Company. There were three sets of bills of lading issued by the master to Gibernau and Company. One covered the portion of the shipment of jerked beef made for the account of the vessel; another, the portion of that shipment made for the account of Pagés; the third, the shipment of garlic made for the joint account of Pagés and Gibernau and Company. All the bills set forth that the goods were taken for the account and at the risk of whom it might concern. The ship's manifest was signed under date March 15, and the destination of the cargo was stated thus: "Shipped by Pla Gibernau Co. To order." The *visé* of the counsel of Spain, dated the day before, was: "Good for Havana, with a cargo of jerked beef and garlic." As the vessel had a share in the shipment of the jerked beef, and the consignees were named in the invoices, which set forth that the shipments were made by their orders for their account and at their risk, it would appear that the manifest was erroneous, and this and the fact that the bills of lading stated that the goods were taken "for account of whom it may concern," should be especially noted, since the reasonable inference is that the consignees must have been known to the master. And it also should be observed that there was no charter-party, which would have necessarily revealed the engagements of the vessel, but which naturally would not be entered into if the commercial venture was that of her owner. The general rule is that a consignor on delivering goods ordered, to a master of a ship, delivers them to him as the agent of the consignee so that the property in them is vested in the latter from the moment of such delivery, though the rule may be departed from by agreement or by a particular trade custom, whereby the goods are shipped as belonging to the consignor and on his account and risk. We think that on the face of the papers it must be concluded that when these goods were delivered to the vessel they became the property of the consignees named in the invoices. Hence the shipments of jerked beef must be regarded as owned by Pagés, or by him and the owners of the *Carlos F. Roses*. One half of the garlic belonged to Pagés, the remaining half was consigned to Gibernau and Company, and they did not claim, and have not claimed it, nor was it asserted that Gibernau and Company retained the ownership of any part of the cargo after its delivery to the vessel. Property so long unclaimed may be treated as in any view good prize. *The Adeline*, 9 Cranch, 244; *The Harrison*, 1 Wheat. 298. In fact, claimants admit that the whole cargo "was ultimately destined for Don Pedro Pagés of Havana." The bill of exchange drawn by Gibernau and Company named Kleinwort Sons and Company as accepters, and directed them to charge the amount to the account of "Pedro Pagès of Havana as per

advice." The bill drawn by Maristany also named Kleinwort Sons and Company as drawees, and directed them to charge the amount "to P. Roses Valenti of Barcelona as per advice." In neither of them was there any reference to the cargo, and, so far as appeared, the amounts were at once charged up to the person named.

Harcke said that when the bills of exchange were accepted by Kleinwort Sons and Company bills of lading covering the shipment of 110,256 kilos of jerked beef and of the garlic were delivered to them in consideration of the acceptance of the draft for £2,714 13s 8d, and that bills of lading for the 165,354 kilos of jerked beef were afterwards delivered in consideration of the acceptance of the draft for £3,583 11s 6d. But the date of the latter delivery was not given, and it affirmatively appeared that whenever these bills of lading reached Kleinwort Sons and Company they were retained "pending the disposal of the cargo." Both drafts were accepted April 6, and the bills of lading for the 110,256 kilos of jerked beef and for the garlic were forwarded to Gelak and Company on April 9, but the bills for the 165,384 kilos of jerked beef, whenever received, never were. The instructions to Gelak and Company were not put in evidence, nor any of the correspondence with Valenti or Pagés. In June, Gelak and Company cabled that the bills sent to them had not been received; in September they turned up, but no information was afforded as to how they came into Gelak and Company's possession; and in October duplicates were also received by claimants from Gelak and Company, with, so far as disclosed, no accompanying explanation. And Harcke's affidavits failed to set forth the relations, transactions or correspondence existing and passing between claimants and the enemy owners of the cargo. This, although, as Sir William Scott said in *The Magnus*, 1 C. Rob. 31, "the correspondence of the parties, the orders for purchase, and the mode of payment, would have been the points to which the court would have looked for satisfaction."

The affidavits alleged that claimants were wholly unindemnified except by the proceeds of the cargo and the insurance thereon, by which the insurers were subrogated to their own rights, but did not state whether the insurance contemplated a war risk, or why the bills of lading for the larger portion of the beef were retained by claimants and not sent to their Havana agents, or whether they retained them upon instructions from the enemy owners; or whether they came to claimants from Spain; nor did anything appear in respect of the interest of Pagés as consignee for himself, or in a representative capacity; nor of Valenti, the owner of the enemy vessel, who resided at Barcelona. The evidence of enemy interest arising on the face of the documents called on the asserted neutral owners to prove beyond question their

right and title. And still, for all that appears, the documents may have been sent merely to facilitate delivery to the agent of the enemy owners.

Bills of lading stand as the substitute and representative of the goods described therein, and while *quasi* negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferor's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it. *Pollard* v. *Vinton*, 105 U. S. 7; *Shaw* v. *Railroad Company*, 101 U. S. 557.

Generally speaking, in the purchase and shipment of goods on bills of lading attached to bills of exchange drawn against them, the bill of exchange is drawn on the consignee and purchaser, and sent forward for collection through the banker at the place of shipment, who advances on the draft, and thereafter realizes on it through his correspondents, or by sale as exchange; or the banker at some other point, or at the general exchange centre, may be the drawee of the bill of exchange instead of the consignee or real owner, the banker standing in the place of the owner, in virtue of some arrangement with his customer, or on the faith of a running account, the pledge of other securities, or the customer's personal liability, so that the draft may be charged up at once, and, at all events, the control of the goods is not the sole reliance of the banker.

In the case in hand, the captors succeeded to the enemy owners' rights, and could have introduced evidence as to the real nature of the transactions, and so have rebutted any presumption in favor of the bankers as purchasers for value, and although they did not do this, the question still remains that in prize courts it is necessary for claimants to show the absence of anything to impeach the transaction, and at least to disclose fully all the surrounding circumstances. And this we think claimants have failed to do.

The right of capture acts on the proprietary interest of the thing captured at the time of the capture and is not affected by the secret liens or private engagements of parties. Hence the prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading. The assignment of bills of lading trans-

fers the *jus ad rem*, but not necessarily the *jus in rem*. The *jus in re* or *in rem* implies the absolute dominion, — the ownership independently of any particular relation with another person. The *jus ad rem* has for its foundation an obligation incurred by another. Sand. Inst. Just. Introd., xlviii; 2 Marcadé, Expl. du Code Napoléon, 350; 2 Bouvier (Rawle's Revision), 73; *The Young Mechanic*, 2 Curtis, 404.

Claimants did not obtain the *jus in rem*, and, according to the great weight of authority, the right of capture was superior.

In *The Frances*, 8 Cranch, 418, a New York merchant claimed two shipments of goods, one in consequence of an advance made to enemy shippers by him in consideration of the consignment, and the other in virtue of a general balance of account due to him from the shippers as their factor. Both consignments were at the risk of the enemy shippers. The goods were condemned as enemy property, and the sentence was affirmed. This court said:

"The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. * * * But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. * * * But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. * * * The principal strength of the argument in favor of the claimant seemed to be rested upon the position that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel; and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded, if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any

time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the court below must be affirmed with costs."

In *The Mary and Susan*, 1 Wheat. 25, an American merchantman bound from Liverpool to New York, was captured by a privateer of the United States during the war of 1812. In her cargo were certain goods which had been shipped by British subjects to citizens of the United States, in pursuance of orders received before the declaration of war. Previous to the execution of the orders the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to the bankers, who also repeated the same request, the invoices being for gain and risk of the consignees, and stating the goods to be then the property of the bankers, and it was held that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not divested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

In *The Hampton*, 5 Wall. 372, the schooner *Hampton* and her cargo had been captured, libelled and condemned as prize of war. The master of the vessel was her owner, but interposed no claim; nor did any one claim the cargo. One Brinckley appeared and claimed the vessel as mortgagee. The *bona fides* of this mortgage was not disputed, nor that he was a loyal citizen. But his claim was dismissed, and, the case having been certified to this court, it was held that in proceedings in prize, and under the principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens subject to be overriden by the capture. Mr. Justice Miller said:

"The ground on which appellant relies is, that the mortgage, being a *jus in re* held by an innocent party, is something more than a mere lien, and is protected by the law of nations. The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was *in delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the prize courts the strict common-law doctrines, which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern admiralty courts to treat mortgages as equity courts treat them, as a mere security for the debt for which they are given, and therefore no more than a lien on the property conveyed. But it is unnecessary to examine this question minutely, because an

obvious principle of necessity must forbid a prize court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end of all prize condemnation. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture, would only have to raise a sufficient sum of money on them, by *bona fide* mortgages, to indemnify them in case of such capture. If the vessel or cargo was seized, the owner need not appear, because he would be indifferent, having the value of his property in his hand, already. The mortgagees having an honest mortgage which he could establish in a court of prize, would either have the property restored to him or get the amount of the mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break the blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms. The principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all danger to parties disposed to break them, cannot be recognized as a rule of prize courts."

In *The Battle*, 6 Wall. 498. the steamer *Battle* and cargo were captured on the high seas as prize of war, brought into port and condemned, for breach of blockade and also as enemy property. Two claims were set up against the steamer in the court below, one for supplies, and another for materials furnished and for work and labor in building a cabin on the boat. These claims were dismissed, and the decree affirmed by this court, Mr. Justice Nelson delivering the opinion, saying: "The principle is too well settled that capture as prize of war, *jure belli*, overrides all previous liens, to require examination."

Such is the rule in the British prize courts. *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, Spinks Prize Cases, 26.

The Tobago was a case of claim to a captured French vessel, made on behalf of a British merchant as the holder of a bottomry bond executed and delivered to him by the master of the ship before the commencement of hostilities between Great Britain and France. Sir William Scott said:

"The integrity of this transaction is not impeached, but I am called upon to consider whether the court can, consistently with the principles of law that govern its practice, afford relief. It is the case of a bottomry bond, given fairly in times of peace, without any view of infringing the rights of war, to relieve a ship in distress. * * * But can the court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand

restitution of such interests in a court of prize? * * * The person advancing money on bonds of this nature, acquires, by that act, no property in the vessel; he acquired the *jus in rem*, but not the *jus in re* until it has been converted and appropriated by the final process of a court of justice. * * * But it is said that the captor takes *cum onere*, and, therefore, that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply where the onus is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract. * * * But it is a proposition of much wider extent, which affirms that a mere right of action is entitled to the same favorable consideration in its transfer from a neutral to a captor. It is very obvious that claims of such a nature may be framed as that no powers belonging to this court can enable it to examine them with effect. They are private contracts, passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is, therefore, unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. * * * I am of opinion that there is no instance in which the court has recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the prize courts."

In *The Marianna*, the vessel had been sold at Buenos Ayres by American owners to a Spanish merchant; the purchase-money, however, had not been paid in full, but was to be satisfied out of the proceeds of a quantity of tallow on board the vessel for sale, consigned to the agents of the American vendors at London. The vessel was seized on her voyage to England, documented as belonging to a Spanish merchant, and sailing under the flag and pass of Spain. The former American proprietors made claim to the cargo, but the claim was disallowed because the claimants' interest was not sufficient to support it; and the court said:

"Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most creditable documents, declaring the property to belong to the enemy, would only serve to mislead them, if such

documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions and to decide on the simple title of property, with scarcely any exceptions. * * * As to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property."

These cases were cited by Dr. Lushington in *The Ida* as settling the law. In that case claim was made by a neutral merchant to a cargo of coffee which had been consigned to him by an enemy on the credit of certain advances, as security for payment of which bills of lading covering the cargo had been delivered to him. But the court declined to recognize the lien, and condemned the cargo as enemy property. Dr. Lushington referred to *The San Jose Indiano and Cargo*, 2 Gallison, 267, and subscribed to what was there said by Mr. Justice Story, but thought his remarks inapplicable to the case in hand.

The case referred to was affirmed by this court. 1 Wheat. 208. Goods were shipped by Dyson, Brothers and Company of Liverpool on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed: "Consigned to Messrs. Dyson, Brothers and Finnie, by order and for account of J. Lizaur." In a letter accompanying the bill of lading and invoice, Dyson, Brothers and Company wrote Dyson, Brothers and Finnie: "For Mr. Lizaur we open an account in our books here, and debit him, &c. We cannot yet ascertain the proceeds of his hides, &c., but find his order for goods will far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him." The two houses consisted of the same persons. It was held that the goods were, during their transit, the property and at the risk of the enemy

shippers, and therefore subject to condemnation. Lizaur's claim was rejected although Dyson, Brothers and Company had the proceeds of his hides in their hands.

The Lynchburg, Blatchford's Prize Cases, 57, and *The Amy Warwick*, 2 Sprague, 150, are cited on behalf of claimants, but, as we read them, they do not sustain their contention. The schooner *Lynchburg* with a cargo of coffee had been libelled during the civil war as enemy property, and also for an attempt to violate blockade. Brown Brothers and Company, loyal citizens, intervened as claimants of 2,045 bags of coffee, part of the cargo. They alleged that they had made an advance of credit to Maxwell, Wright and Company, neutral merchants of Rio de Janeiro, for the purchase of the coffee, under which credit Maxwell, Wright and Company drew drafts on Brown Brothers and Company for £6,000, on the condition expressed therein that the coffee purchased by claimants should be held until their advances were reimbursed thereon. It was admitted by the United States attorney that 1,541 bags of the coffee should be released to Brown Brothers and Company, and that was done. As to the remaining 504 bags embraced in the general claim of Brown Brothers and Company, in which Wortham and Company, of Virginia, asserted an interest, it was held by the court that as no proof was given by claimants that the value of 1,541 bags restored to them was not equivalent to the sum of their advances used in purchasing the whole 2,045 bags, the reasonable presumption was that the restoration satisfied the entire advance. And Judge Betts said: "The claim to an absolute ownership of the 2,045 bags was placed before the court in the oral argument, and in the written points filed in the cause by the counsel for the claimants upon the proposition of law that a bill of lading, transmitted to them by the shipper to cover advances, passed to them the title to the cargo purchased therewith. If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts, in derogation of the rights of captors, when the interest of the claimants is only a debt, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of her capture. *The Frances*, 8 Cranch, 418; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24. Here the vessel was an enemy bottom; the bill of lading consigned the cargo to order or assigns, at large, at an enemy's port, and, on the surrender of the principal portion of the consignment to the claimants, no other evidence was given in establishing the facts that the remainder of the shipment was owned by them, or yet stood under hypothecation to them on the bill of lading." The 504 bags were condemned, "because, by intendment of law, that

portion belonged to Wortham and Company, and was not shown by the proofs to be exempt from capture as prize."

In *The Amy Warwick*, J. L. Phipps and Company of New York, British subjects, purchased 4,700 bags of coffee, part of the cargo of an enemy vessel, which they had purchased through Phipps Brothers and Co., their firm at Rio, with funds of an enemy firm, and £2,000 of their own money by draft on Phipps and Co., their firm at Liverpool. They took from the master a bill of lading which stated that Phipps Brothers and Company were the shippers of this coffee, and that it was to be delivered to their order. Indorsed on the bill of lading was a statement declaring that a portion of the coffee was the property of British subjects. Phipps Brothers and Company indorsed the bill of lading over to J. L. Phipps and Co. They also delivered to the master another part of the bill of lading, an invoice of the coffee, and a letter of advice to be conveyed to the firm in New York. This letter stated that the coffee was shipped for account of merchants at Richmond, Virginia, and that a bill of lading would have been sent to them had it not been deemed advisable by reason of the unsettled state of political affairs, for the better protection of the property, and to prevent privateers from molesting the vessel, to have it certified on the bill of lading that a portion of the coffee was British property, and that this referred to the portion against which they had valued on Liverpool. It was held that the facts led plainly to the conclusion that claimants ought to be repaid the amount they had expended from their own funds in the purchase of the coffee and that the residue of the proceeds should be condemned. It was said that as the coffee was purchased at Rio by the claimants, and shipped by them on board the vessel under a bill of lading by which the master was bound to deliver it to their order, and they ordered it to be delivered to J. L. Phipps and Co., that is, to themselves, they were the legal owners of the property, and could hardly be said to have a lien upon it. Their real character was that of trustees holding the legal title and possession with a right of retention until their advances should be paid. The doctrine of liens was considered, and *The Frances*, *The Tobago*, *The Marianna* and other cases examined. Judge Sprague was of opinion that the rule in such cases ought not to be that which stops at the mere legal title, but that which ascertains and deals with the real beneficial interest, "for, if the court were never to look beyond the legal title, the result would be that when such title is held by an enemy in trust for a neutral, the latter loses his whole property; but, when the legal title is in a neutral in trust for an enemy, the property is restored to the neutral, not for his benefit, but merely as a conduit through which it is to be conveyed to

the enemy. To refuse to look beyond the legal title is to close our eyes for the benefit of the enemy. It would enable him always to protect his property by simply putting it in the name of a neutral trustee."

We agree with counsel for the United States that, notwithstanding the indorsement of Gibernau and Company on the bills of lading, the proof of a neutral title was not sufficient. Even if when the neutral interest is adequately proven to be *bona fide*, the claim of the captors may be required to yield, yet in this case the belligerent right overrides the neutral claim, which must be regarded merely as a debt, and the assignment as a cover to an enemy interest.

Something was said in argument in relation to the character of the cargo. It is true that by the modern law of nations, provisions, while not generally deemed contraband, may become so, although belonging to a neutral, on account of the particular situation of the war, or on account of their destination, as, if destined for military use, for the army or navy of the enemy, or ports of naval or military equipment. *The Benito Estenger*, 176 U. S. 568; *The Panama*, 176 U. S. 535; *The Peterhoff*, 5 Wall. 28; Grotius, De Jure Belli et Pacis, lib. III., c. 1, § 5; Hall, § 236.

Doubtless, in this instance, the concentration and accumulation of provisions at Havana might fairly be considered a necessary part of Spanish military operations, *imminente bello*, and these particular provisions were perhaps especially appropriate for Spanish military use; but while these features may well enough be adverted to in connection with all the other facts and circumstances, we do not place our decision upon them.

We are of opinion that a valid transfer of title to this enemy property to claimants was not satisfactorily made out, and that

The decree below must be reserved, and a decree of condemnation directed and be entered, and it is so ordered.[1]

[1] Dissenting opinion of Mr. Shiras, in which Mr. Justice Brewer concurred, omitted.

In *The Siren*, 1868, 7 Wall. 152, it was held that a claim for damages exists against a United States vessel guilty of a maritime tort, as in the case of a merchant vessel; that such claim may not be enforced against the United States as a defendant, but if the United States enters the court as plaintiff, the court will take jurisdiction to the extent of the value of the property, but no judgment lies against the United States beyond the value of the property or for costs. Where, therefore, a prize of the United States ran into and sank another vessel, it was held that the owners of sunken vessel and its cargo could intervene in prize proceedings and have their damages assessed and paid out of the proceeds before distribution to the captors. — Ed.

Section 36.—Recapture—Rescue.

THE "SANTA CRUZ."

High Court of Admiralty, 1798.

(1 *C. Robinson*, 49.)

This was the case of a Portuguese vesssel taken by the French, August 1, 1796, and retaken by English cruisers, on the 28th, after being a month in the possession of the enemy.[1]

Judgment,—Sir W. Scott:—

"* * * In the arguments of the counsel, I have heard much of the rules which the law of nations prescribes on recapture, respecting the time when property vests in the captor; and it certainly is a question of much curiosity to inquire what is the true rule on this subject; when I say the *true rule*, I mean only the rule to which civilized nations, attending to just principles, ought to adhere; for the moment you admit, as admitted it must be, that the practice of nations is various, you admit there is no rule operating with the proper force and authority of a general rule.

"It may be fit there should be some rule, and it might be either the rule of immediate possession or the rule of pernoctation and twenty-four hours' possession; or it might be the rule of bringing *infra præsidia;* or it might be a rule requiring an actual sentence of condemnation; either of these rules might be sufficient for general practical convenience, although in theory perhaps one might appear more just than another; but the fact is, there is no such rule of practice; nations concur in principle, indeed, so far as require firm and secure possession; but their rules of evidence respecting the possession are so discordant and lead to such opposite conclusions that the mere unity of principle forms no uniform rule to regulate the general practice. But were the public opinion of European States more distinctly agreed on any principle as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it.

"That obligation could arise only from a reciprocity of practice in other nations; for from the very circumstance of the prevalence of

[1] Statement abridged and only part of the judgment given. — Ed.

a different rule among other nations, it would become not only lawful, but necessary to that one nation to pursue a different conduct: for instance, were there a rule prevailing among other nations that the immediate possession and the very act of capture should divest the property from the first owner, it would be absurd in Great Britain to act towards them on a more extended principle; and to lay it down as a general rule, that a bringing *infra præsidia*, though probably the true rule should in all cases of recapture be deemed necessary to divest the original proprietor of his rights; for the effect of adhering to such a rule would be gross injustice to British subjects. * * *

"If I am asked, under the known diversity of practice on this subject, what is the proper rule for a State to apply to the recaptured property of its allies, I should answer that the liberal and rational proceeding would be, to apply in the first instance the rule of that country to which the recaptured property belongs. * * *

"If there should exist a country in which no rule prevails, the recapturing country must then of necessity apply its own rule and rest on the presumption that that rule will be adopted and administered in the future practice of its allies. * * *

I understand [the law of England] to be clearly this: That the maritime law of England, having adopted a most liberal rule of restitution on salvage, with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle. In such a case it adopts their rule and treats them according to their own measure of justice.[1]

THE "CARLOTTA."

HIGH COURT OF ADMIRALTY, 1803.

(5 *C. Robinson*, 54.)

This was a question of salvage, on the recapture of a Spanish ship and cargo from a French cruiser.

Judgment. — Sir W. SCOTT: —

"The question now to be decided is, whether salvage is due on the neutral property in this ship which has been recaptured out of

[1] As Portugal had adopted the twenty-four-hour rule, that principle was applied to those ships recaptured during the time that rule prevailed in Portugal, and the rate of salvage decreed was the Portugese rate, one-eighth to ships of war and one-fifth to privateers. The English rule allowed one-sixth to privateers. — ED.

the possession of the enemy. It certainly has not been the practice of this court to decree salvage under such circumstances generally; but, in consequence of the violent conduct of France during the last war, it was thought not unreasonable on the part of neutral merchants themselves, that salvage should be allowed. * * *

"I am, therefore, not disposed to hold generally that neutral property recaptured from French cruisers shall be subject to salvage. The rule, so far as it can be considered a general rule, is rather to be laid down the other way. At the same time, if any edict can be appealed to or any fact established, by which it can be shewn that the property would have been exposed to condemnation in the courts of France, I shall hold that to be sufficient ground to induce me to pronounce for salvage in that particular case. With regard to the precedent of the *Jonge Lambert* (5 C. Rob., 54, note), I think I am warranted to consider the authority of that case as in a great measure done away by the subsequent decision of the Lords in the late war, in which they have repeatedly pronounced for salvage on the recapture of neutral property. In departing from the old rule they have in some degree disclaimed the principle; and, I think, with great propriety, as far as it could be considered as an universal principle, governing the practice of our prize courts in all possible cases, without any possible exception. In the present instance there does not appear to me to be any grounds on which it can be supposed that this property would have been condemned, merely because it came out of the hands of a British privateer, or because the original voyage had been the colony of Spain to London. No edict has been produced from the French code to shew that this property would have been subject to any such penalty on either of those accounts, in the prize courts of France. The expenses of the recaptors must be fully paid; but I shall not pronounce salvage to be due." [1]

[1] For an account of the laws of different countries on the subject of recapture and salvage, see Dana's Wheaton, 466–472. — Ed.

THE "MARY FORD."

SUPREME COURT OF THE UNITED STATES, 1796.

(3 *Dallas*, 188.)

The *Mary Ford* was a British vessel, captured in 1790 by a French squadron and abandoned at sea. The *George*, an American vessel, took possession of the *Mary Ford*, and brought it into Boston harbor, to save the ship and cargo, and then libelled it for salvage in the District Court. From a judgment in favor of the libellants, an appeal was taken to the Supreme Court.[1]

By the Court: We are unanimously of opinion, that the District Court had jurisdiction upon the subject of salvage; and that, consequently, they must have a power of determining to whom the residue of the property ought to be delivered.

In determining the question of property, we think that, immediately on the capture, the captors acquired such a right, as no neutral nation could justly impugn or destroy; and, consequently, we cannot say that the abandonment of the *Mary Ford*, under the circumstances of this case, revived and restored the interest of the original British proprietors.

Some doubts have been entertained by the court, whether on the principles of an abandonment by the French possessors, the whole property ought not to have been decreed to the American libellants, or, at least, a greater portion of it by way of salvage; but as they have not appealed from the decision of the inferior court, we cannot now take notice of their interest in the cause.

Upon the whole, let the decree be affirmed.[2]

[1] This statement is substituted for that of the original report. — ED.

[2] In *Hopner* v. *Appleby*, 1828, 5 Mason, 71, 75, Story, J., said: "Some principles are extremely clear, and indeed are so well settled that nothing more is necessary to command approbation than a simple enunciation of them. Neutral nations are bound equally by their duty and their interest to consider the existing state of things between belligerents as rightful. The right of capture by the law of war cannot be disputed, and the lawfulness of the possession thereby acquired cannot be inquired into by the tribunals of a neutral nation, with the single exception of cases where the capture itself is an infringement of the jurisdiction or rights of the neutral nation itself. In all other cases, the question of prize or no prize exclusively belongs to the cognizance of the courts of the capturing power. The possession of the captors is to be deemed a possession *bona fide*, and inviolable; and as was said by the Supreme Court in the case of *The Mary Ford*, 3 Dall. R. 188, 198, immediately upon the capture the captors acquire such a right as no neutral nation can justly impugn or destroy. *The Josefa Segunda*, 5 Wheaton R. 338, 357."

And in *Booth* v. *L'Esperanza*, 1798, Bee, 93 (3 Fed. Cas. 885), Bee, J., held, citing

THE "BEAVER."

High Court of Admiralty, 1801.

(3 *C. Robinson*, 292.)

This was a case of a British merchant ship, taken with a cargo of wine in sight of the English coast, by a French privateer; when all the crew, except the master and one boy had been taken out: the master seeing an opportunity rose upon five Frenchmen that had been put on board, and by knocking down the prize master, and possessing himself of his pistols, the only firearms on board, succeeded in driving the rest of the crew down below, and gained possession of the vessel. After he had steered a considerable time towards the English coast, a storm came on, in which the vessel was nearly lost: a British frigate coming in sight, the master obtained the assistance of twelve men, by whose aid he kept possession till it was thought she must inevitably perish: they then all returned to the frigate; but the storm afterwards abating, the master requested that he might be permitted to go again to the ship to try if he could not save her; and with the assistance of a boat's crew from the frigate, he succeeded and brought the vessel safe into port.

Judgment. — Sir W. Scott. — This is a case of very peculiar merit on the part of the original salvors, the master and the boy, by whose distinguished gallantry the property was rescued out of the hands of the enemy. It is impossible to accede to the representation that has been given on the part of the King's ship, that the vessel is to be considered as a derelict saved by their exertions. The vessel itself was never in the state of a derelict — the eye of the master was constantly upon it; and if I may so say, kept a possession of it for the whole time, under the *spes ac animus recuperandi*. The actual recovery is attributable to him; he and the boy were the only parties, in the first service; and his advice, seconded by his example, it was, which operated most effectually to the final preservation of the vessel: from the beginning to

The Mary Ford, supra, that a vessel in distress, met with at sea, and brought into the port of a neutral power, must be restored, after payment of salvage, to those who were in possession of her when she was met.

And in *L'Invincible*, 1816, 1 Wheat. 238, 258, Mr. Justice Johnson cites and explains the case in the text, holding that the courts of this country have no jurisdiction to redress any supposed torts committed on the high seas upon the property of its citizens by a cruiser regularly commissioned by a foreign and friendly power, except where such cruiser has been fitted out in violation of our neutrality. — Ed.

the end, he is to be considered as most materially active in the whole affair: he is the person whose service must stand highest in the estimation of the court; and I do not recollect to have seen any case of salvage in which personal merit of that species presented itself more strongly for encouragement and reward. On this part of the case I shall decree at least the usual salvage of a sixth.

With respect to the King's ship, I cannot admit the propriety of the inflamed representation which has been offered of their services: It is the duty of every King's ship, and indeed of every other ship, to give assistance, as well against the elements as against the enemy. It was properly performed in this instance; but what was the amount of their exertions? There were two acts; — one of sending some men on board, on the appearance of the vessel in distress, and the other of sending a cable and anchor with some men, when the storm abated; acts useful and meritorious, but ranking at the best but moderately in the scale of utility and merit. In these acts of assistance there was no personal danger: to call it a case of derelict, preserved by their interposition, does not accord with any view that I have been used to entertain of the legal nature of a derelict, or of a salvage service applied to property in that situation. The value of the property saved is about £6239. — I shall give a sixth of that sum, or £1000 to the master and boy, in this proportion, £850 to the master, and £150 to the boy; who, I observe, is described "as his apprentice" and rather above the condition of a common sea boy without articles: if half as much, or £500 is given to the King's ship, to be distributed amongst the whole number of persons on board, in the ordinary proportions of a prize distribution, it is the utmost that can be allowed, upon the most liberal justice that can be due to their services. The expense of this application to the discretion of the court must be paid by the owners.[1]

[1] In *The Pennsylvania*, 1809, 1 Act. 33, Sir William Grant held the master or crew of a neutral vessel captured not bound to assist in carrying the vessel into port for adjudication; that resistance to the captors by the master or crew must be proved to have been actually made, in order to subject the vessel to condemnation on the principle of rescue. See *The War Onskan*, 1799, 2 C. Rob. 299. In *Bas* v. *Tingy*, 1800, 4 Dall. 37, salvage was allowed for the recapture of an American vessel from French captors, and in *Talbot* v. *Seeman*, 1801, 1 Cr. 1, for the capture of a neutral vessel; *Clayton* v. *Ship Harmony*, 1 Pet. Adm. Dec. 70; 3 Kent's Com. 247; *Williams* v. *Suffolk Ins. Co.*, 1838, 3 Sumn. 270, 275. Mr. Dana's digest of authority is as follows: —

"In a case of rescue of a vessel of commerce, the salvage is civil, and the cause does not go into a prize court. Recapture from an enemy is cognizable by a prize court as a belligerent act, and presents a case of military salvage. If, in addition to the belligerent recapture, there has been a voluntary act of saving from a distinct marine peril, beyond the obligations of the parties, civil salvage may be combined with the military, and incidentally adjudicated by the prize court having cognizance of the

SECTION 37. — HOSTILE OCCUPATION, CONQUEST, AND CESSION.

UNITED STATES v. RICE.

SUPREME COURT OF THE UNITED STATES, 1819.

(4 *Wheaton*, 246.)

STORY, J., delivered the opinion of the court: —

"The single question arising on the pleadings in this case is, whether goods imported into Castine, during its occupation by the enemy, are liable to the duties imposed by the revenue laws upon

recapture. It is the duty of persons in the naval service, in time of war, to recapture as much as to capture; but it is a duty they owe to their government; and the policy and practice has always been, if the owner claims his vessel, to require him to pay salvage to the recaptors, which is in lieu of the prize-money they would receive in case the recaptured vessel had been condemned as prize. The mariner's contract with the owners, in a vessel of commerce, does not oblige him to attempt a rescue, after capture by a belligerent enemy, in such a sense that his refusal or failure to attempt it, in a proper case, would be a breach of his contract. It is, therefore, always a case for salvage. *Two Friends*, 1 Rob. 271; *The Lilla*, 2 Sprague's Decisions, and 25 Law Reporter, 92; *Helen*, 3 Rob. 224.

"If cruiser takes a prize and loses it, whether by rescue, recapture, or otherwise, and she is again captured by a second cruiser of the same nation, it is not a recapture for the benefit of the first captor, subject to salvage, but an original capture. For these and like cases of mixed recapture, see Valin, Traité des Prises, ch. vi. § 1. *The Polly*, Nov. 21, 1780, 4 Rob. 217, note; *The Marguerite*, April 3, 1781; *Astrea*, 1 Wheat. 125; *Lord Nelson*, Edw. 79; *Diligentia*, 1 Dods. 404; *John and Jane*, 4 Rob. 216; *Gage*, 6 Rob. 272; Ordonnance de 1681, Des Prises, art. 9, 'De Propriété,' No. 99; *Azuni*, Partie II. ch. 4, §§ 8, 9; Emerigon, des Assurances, tit. i. pp. 504–5; 3 Phillimore's Intern. Law, § 424; Chitty's Law of Nations, 91; *The Short Staple*, 9 Cranch, 55; *Bello*, Princ. de Der. Nat. 193; *Henry*, Edw. 66.

"Salvage is not due to a public ship for extricating another public ship from danger of capture, in a common enterprise. *The Bell*, Edw. 66. Sir W. Scott said it would be converting every engagement into a struggle for salvage.

"As to right of revenue cutters and privateers in recaptures, see *The Wanstead*, 1 Edw. 369; *The Providence*, Id. 270; *The Dorothy Foster*, 6 Rob. 88; *The Bellona*, Edw. 63; *The Sedulous*, 1 Dods. 253; U. S. Prize Act, 1864, ch. 174, §§ 10, 32, 33 (13 U. S. Law, 306)." Dana's Wheaton, note No. 184.

For the provisions of recapture, see U. S. Rev. St. § 4652; English Prize Act of 27 and 28 Vict. c. 25, § 40.

The Emily St. Pierre, 1864, Dana's Wheaton, 475, note 183, established that it is not the duty of a neutral government to restore a private vessel of one of its citizens which has been rescued by her crew from a belligerent captor before condemnation. See also Bernard, Neutrality of Great Britain, 325–329.

In the case of *The Lone*, 3 Op. Atty.-Gen. 377, this vessel had entered the port of Matamoras while it was blockaded by a French squadron (1838), and sailed thence for

goods imported into the United States. It appears, by the pleadings, that on the first day of September, 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace, in February, 1815. During this period, the British government exercised all civil and military authority over the place; and established a custom-house, and admitted goods to be imported, according to regulations prescribed by itself, and, among others, admitted the goods upon which duties are now demanded. These goods remained at Castine until after it was evacuated by the enemy, and upon the reëstablishment of the American government, the collector of the customs, claiming a right to American duties on the goods, took the bond in question from the defendant, for the security of them.

"Under these circumstances, we are of opinion, that the claim for duties cannot be sustained. By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them; for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British government chose to require. Such goods were, in no correct sense, imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions.

"The doctrines respecting the *jus postliminii* are wholly inapplica-

New Orleans. On the voyage she was captured by a French cruiser; but some days later she was rescued by her captain, who brought her into New Orleans. A demand was made on the President by the French Government for her return to the captors. Attorney-General Grundy advised that the President had no power to grant the demand, the case involving questions to be settled by the courts, and not by the executive, and that the claimants must go into the courts. He also advised that if a vessel, after escaping from her captors, terminated her voyage in safety, her liability to condemnation for the escape entirely ceases. 3 Wharton's Digest, 179. — Ed.

ble to the case. The goods were liable to American duties, when imported, or not at all. That they were not so liable at the time of importation, is clear from what has been already stated; and when, upon the return of peace, the jurisdiction of the United States was reassumed, they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretence to say that American duties could be demanded; and, upon principles of public or municipal law, the cases are not distinguishable.

"The authorities cited at the bar, would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority."[1]

THE AMERICAN INSURANCE COMPANY v. CANTER.

SUPREME COURT OF THE UNITED STATES, 1828.

(1 *Peters*, 511.)

MARSHALL, C. J.:[2]—"The course which the argument has taken will require, that, in deciding this question, the Court should take into view the relation in which Florida stands to to the United States.

"The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory either by conquest or by treaty.

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of

[1] In the *United States* v. *Hayward*, 1815, 2 Gall. 485, Mr. Justice Story held that Castine was to be considered a "foreign port," with reference to the non-importation acts. — ED.

[2] Facts omitted and only so much of the opinion is given as relates to the status of Florida after the cession of that territory to United States in 1819. — ED.

those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly-created power of the State.

"On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: 'The inhabitants of the territories which his Catholic majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the federal Constitution; and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.'

"This treaty is the law of the land and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government, till Florida shall become a state. In the meantime Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'"[1]

[1] In the head-note to *Cross* v. *Harrison*, 1853, 16 How. 164, the following account is given of the status of California under the military occupation of the United States.

"In the war with Mexico the port of San Francisco was conquered by the arms of the United States, in the year 1846, and shortly afterwards the United States had military possession of all of Upper California. Early in 1847 the President of the United States, as constitutional commander-in-chief of the army and navy, authorized the military and naval commanders of the United States forces in California to exercise the belligerent rights of a conqueror and to form a civil and military government for the conquered territory, with power to impose duties on imports and tonnage for the support of such government and of the army which had the conquest in possession.

"This was done, and tonnage and import duties were levied under a war tariff, which had been established by the civil government for that purpose until official notice was received by the civil and military governor of California, that a treaty of peace had been made with Mexico by which Upper California had been ceded to the United States.

"Upon receiving this intelligence the governor directed that import and tonnage duties should thereafter be levied in conformity with such as were to be paid in the other ports of the United States, by the acts of Congress; and for such purpose he appointed the defendant in this suit collector of the port of San Francisco.

"The plaintiffs now seek to recover from him certain tonnage duties and imposts upon foreign merchandise paid by them to the defendant as collector between the 3d of February, 1848 (the date of the treaty of peace), and the 13th of November,

FLEMING v. PAGE.

SUPREME COURT OF THE UNITED STATES, 1850.

(9 *Howard*, 603.)

This action is brought by the plaintiffs, merchants, residing in the city of Philadelphia, against the defendant, the late collector of the port of Philadelphia, to recover the sum of one thousand five hundred and twenty-nine dollars, duties paid on the 14th of June, 1847, under protest, on goods belonging to the plaintiffs, brought from Tampico while that place was in the military occupation of the forces of the United States.

On the 15th of November, 1846, Commodore Conner took military possession of Tampico, a seaport of the State of Tamaulipas, and from that time until the treaty of peace it was garrisoned by American forces, and remained in their military occupation.

Justice was administered there by courts appointed under the military authority, and a custom-house was established there, and a collector appointed, under the military and naval authority.

Upon a certificate of division in opinion in the Circuit Court the case came up to this court.

Judgment,—TANEY, C. J. :—

"The question certified by the Circuit Court turns upon the construction of the act of Congress of July 30, 1846.

"The duties levied upon the cargo of the schooner *Catharine* were duties imposed by this law upon goods imported from a foreign country. And if at the time of this shipment Tampico was not a foreign port, within the meaning of the act of Congress, then the duties were illegally charged, and, having been paid under protest,

1849 (when the collector appointed by the President, according to law, entered upon the duties of his office), upon the ground that they had been illegally exacted. The formation of the civil government in California, when it was done, was the lawful exercise of a belligerent right over a conquered territory. It was the existing government when the territory was ceded to the United States, as a conquest, and did not cease as a matter of course, or as a consequence of the restoration of peace ; and it was rightfully continued after peace was made with Mexico, until Congress legislated otherwise, under its constitutional power, to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

"The tonnage duties and duties upon foreign goods imported into San Francisco were legally demanded and lawfully collected, and afterwards, from the ratification of the treaty of peace until the revenue system of the United States was put into practical operation in California under the acts of Congress passed for that purpose." — ED.

the plaintiffs would be entitled to recover in this action the amount exacted by the collector.

"The port of Tampico, at which the goods were shipped, and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly at the time of the shipment subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out, or had submitted to our army and navy; and the country was in the exclusive and firm possession of the United States, and governed by its military authorities acting under the orders of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the acts of Congress.

"The country in question had been conquered in war. But the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.

"A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

"It is true, that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor main-

tains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

"But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States, while it was occupied by their arms, did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President, under which Tampico and the State of Tamaulipas were conquered and held in subjection, was simply that of a military commander prosecuting a war, waged against a public enemy, by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made.

"Again, there was no act of Congress establishing a custom-house at Tampico, nor authorizing the appointment of a collector; and, consequently, there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo, in the manner directed by law, where the voyage is from one port of the United States to another. The person who acted in the character of collector in this instance, acted as such under the authority of the military commander, and in obedience to his orders; and the duties he exacted, and the regulations he adopted, were not those prescribed by law, but by the President in

his character of commander-in-chief. The custom-house was established in an enemy's country, as one of the weapons of war. It was established, not for the purpose of giving to the people of Tamaulipas the benefits of commerce with the United States, or with other countries, but as a measure of hostility, and as a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than contributions levied upon the enemy, which the usages of war justify when an army is operating in the enemy's country. The permit and coasting manifest granted by an officer thus appointed, and thus controlled by military authority, could not be recognized in any port of the United States, as the documents required by the act of Congress when the vessel is engaged in the coasting trade, nor could they exempt the cargo from the payment of duties.

"This construction of the revenue laws has been uniformly given by the administrative department of the government in every case that has come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For, after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury Department, that goods imported from Pensacola before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is, that although Florida had, by cession, actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic, by act of Congress; and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the government. And, although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island, and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And, in the latter case, after a custom-house had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the sea-coast. The Department in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a

newly-acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by act of Congress.

"The principle thus adopted and acted upon by the executive department of the government has been sanctioned by the decisions in this court and the circuit courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say, that there is no discrepancy between them. And all of them, so far as they apply, maintain, that under our revenue laws every port is regarded as a foreign one, unless the custom-house from which the vessel clears is within a collection district established by act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States.

"In the view we have taken of this question, it is unnecessary to notice particularly the passages from eminent writers on the laws of nations which were brought forward in the argument. They speak altogether of the rights which a sovereign acquires and the powers he may exercise in a conquered country, and they do not bear upon the question we are considering. For in this country the sovereignty of the United States resides in the people of the several States, and they act through their representatives according to the delegation and distribution of powers contained in the constitution. And the constituted authorities to whom the power of making war and concluding peace is confided, and of determining whether a conquered country shall be permanently retained or not, neither claimed nor exercised any rights or powers in relation to the territory in question but the rights of war. After it was subdued it was uniformly treated as an enemy's country and restored to the possession of the Mexican authorities when peace was concluded. And certainly its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws.

"Neither is it necessary to examine the English decisions which have been referred to by counsel. It is true that most of the States have adopted the principles of English jurisprudence, so far as it concerns private and individual rights, and when such rights are in question we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty

which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own constitution and form of government must be our only guide. And we are entirely satisfied that, under the constitution and laws of the United States, Tampico was a foreign port, within the meaning of the act of 1846, when these goods were shipped, and that the cargoes were liable to the duty charged upon them, and we shall certify accordingly to the circuit court."

Mr. Justice McLean dissented.

Order.— "This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Pennsylvania, and on the point or question on which the judges of the said circuit court were opposed in opinion and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel.—On consideration whereof, it is the opinion of this court, that Tampico was a foreign port within the meaning of the act of Congress of July 30, 1846, entitled 'An act reducing the duties on imports, and for other purposes,' and that the goods, wares, and merchandise as set forth and described in the record were liable to the duties charged upon them under said act of Congress. Whereupon it is now here ordered and adjudged by this court that it be so certified to the said circuit court."

JECKER v. MONTGOMERY.

Supreme Court of the United States, 1851.

(13 *Howard*, 498.)

After California had been occupied by the United States forces, during the war with Mexico, a Prize Court was set up at Monterey, at the request of Commodore Biddle, and sanctioned by the President.

An American vessel—the *Admittance*—was captured for trading with the enemy, April 7, 1847, and condemned by this court at Monterey; and the vessel and cargo were sold under the sentence.

The question finally came before the Supreme Court.

Chief Justice Taney, in pronouncing the judgment, said in respect of the power of establishing courts:—

"* * * In relation to the proceedings in the court at Monterey, which is the subject of the first demurrer, the decision of the circuit court is correct.

"All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States the judicial power of the general government is vested in one supreme court, and in such inferior courts as Congress shall, from time to time, ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and its authority from the Constitution or the laws of the United States. And neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the law of nations.

"The courts established or sanctioned in Mexico during the war by the commanders of the American forces were nothing more than the agents of the military power, to assist in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms; they were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party.

"The second demurrer denies the authority of the district court to adjudicate, because the property had not been brought within its jurisdiction. But that proposition cannot be maintained; and a prize court, when a proper case is made for its interposition, will proceed to adjudicate and condemn the captured property or award restitution, although it is not actually in the control of the court. It may always proceed *in rem* whenever the prize or proceeds of the prize can be traced to the hands of any person whatever." [1]

[1] In *Leitensdorfer* v. *Webb*, 1857, 20 How. 176, 177–179, the court held that when New Mexico was conquered it was only the allegiance of the people that changed; that their relation to each other and their rights of property remained unchanged; that the executive authority properly established a provisional government, which ordained laws and instituted a judicial system; all of which continued after the war, until modified by the direct legislation of Congress or by the territorial government established by its authority, and that a suit brought in a court established by the provisional government was properly transferred to a court created by the act of Con-

UNITED STATES v. MORENO.

(1 *Wallace*, 400, 404.)

Mr. Justice SWAYNE. California belonged to Spain by the rights of discovery and conquest. The government of that country established regulations for transfers of the public domain to individuals. When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations upon the same subject. These two sovereignties are the spring heads of all

gress establishing the territory of New Mexico, the jurisdiction of which was fixed by a State statute.

In the case of the *Grapeshot*, 1869, 9 Wall. 129, the Supreme Court decided that, during the civil war, when the national forces occupied parts of the revolted territory, it was within the authority of the President, as commander-in-chief, to establish provisional courts to try causes arising under the laws of the State or of the United States. And as to the power of the military occupant, see *New Orleans* v. *Steamship Co.*, 1874, 20 Wall. 387; *Mechanics' & Traders' Bank* v. *Union Bank*, 22 id. 226; *Harrison* v. *Meyer*, 1875, 92 U. S. 111; *U. S.* v. *Diekelman*, 1875, id. 520; *Neal Dow* v. *Johnson*, 1879, 100 id. 158; *Gates* v. *Goodloe*, 1879, 101 id. 612. As regards private property destroyed by military operations, see *U. S.* v. *Pacific R. R.*, 1886, 120 U. S. 227, holding that the United States is not responsible for the injury or destruction of private property caused by its military operations during the late civil war, and that private parties were not chargeable for works constructed on their property by the United States to facilitate such operations. See also *Taylor* v. *Nashville & Chattanooga R. R. Co.*, 1869, 6 Cold. (Tenn.) 647. See also Magoon, Military Occupation, 345–350.

As for martial, as distinguished from military law, see *Ex parte Milligan*, 1867, 4 Wall. 2; *Johnson* v. *Jones et al.*, 1867, 44 Ill., 142 (per Lawrence, J.); *In re D. F. Marais*, [1902] A. C. 109. In this later case the facts briefly were: martial law had been proclaimed in Cape Colony owing to the Boer war, and the petitioner was arrested and kept in custody by the military authorities. Neither the district in which he was taken, nor in which he was held, was the scene of active operations, and the ordinary courts were in session The petitioner applied to the Supreme Court of the colony to release him from military custody, and on the refusal of his application, prayed the Judicial Committee of the Privy Council for special leave to appeal; but the petition was denied (per Halsbury, L. C.). This case has created much comment, and wide difference of opinion exists. In a temperate note in 15 Harv. Law Rev. 850, it is said: "The Supreme Court of the United States has said [in *Ex parte Milligan*, *supra*] that the continued sitting of the ordinary courts, and the absence of visible disorder, absolutely preclude a lawful exercise of martial law. The Judicial Committee of the Privy Council takes an opposite view. It is submitted that the latter view is preferable. Under modern conditions it cannot truly be said that the absence of visible disorder shows there is no necessity for martial law. The continued sitting of courts is too artificial a test to be serviceable. Martial law is the law of necessity. The executive must be left unhampered in time of war to deal with problems summarily, and to take protective measures without waiting for the machinery of the courts." See martial law, military rule, in index to Magoon, *op. cit.*, and an elaborate series of discussion in 18 Law Quarterly Review, 117–158. — ED.

the land titles in California, existing at the time of the cession of that country to the United States by the treaty of Guadalupe Hildalgo. That cession did not impair the rights of private property. They were consecrated by the law of nations, and protected by the treaty.

The treaty stipulation was but a formal recognition of the pre-existing sanction in the law of nations. The act of March 3d, 1851, was passed to assure to the inhabitants of the ceded territory the benefit of the rights of property thus secured to them. It recognizes alike legal and equitable rights, and should be administered in a large and liberal spirit. A right of any validity before the cession was equally valid afterwards, and while it is the duty of the court in the cases which may come before it to guard carefully against claims originating in fraud, it is equally their duty to see that no rightful claim is rejected. No nation can have any higher interest than the right administration of justice.

FOURTEEN DIAMOND RINGS v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES, 1901.

(183 *United States*, 176.)

Mr. Chief Justice FULLER delivered the opinion of the court.

Emil J. Pepke, a citizen of the United States and of the State of North Dakota, enlisted in the First Regiment of the North Dakota United States Volunteer Infantry, and was assigned for duty with his regiment in the island of Luzon, in the Philippine Islands, and continued in the military service of the United States until the regiment was ordered to return, and, on arriving at San Francisco, was discharged September 25, 1899.

He brought with him from Luzon fourteen diamond rings, which he had there purchased, or acquired through a loan, subsequent to the ratification of the treaty of peace between the United States and Spain, February 6, 1899, and the proclamation thereof by the President of the United States, April 11, 1899.

In May, 1900, in Chicago, these rings were seized by a customs officer as having been imported contrary to law, without entry, or declaration, or payment of duties, and an information was filed to enforce the forfeiture thereof.

To this Pepke filed a plea setting up the facts, and claiming that the rings were not subject to customs duties; the plea was held insufficient; forfeiture and sale were decreed; and this writ of error was prosecuted.

The tariff act of July 24, 1897, 30 Stat. 151, in regulation of commerce with foreign nations, levied duties "upon all articles imported from foreign countries."

Were these rings, acquired by this soldier after the ratification of the treaty was proclaimed, when brought by him from Luzon to California, on his return with his regiment to be discharged, imported from a foreign country?

This question has already been answered in the negative, in respect of Porto Rico, in *De Lima* v. *Bidwell*, 182 U. S. 1, and unless the cases can be distinguished, which we are of opinion they cannot be in this particular, that decision is controlling.

The Philippines, like Porto Rico, became, by virtue of the treaty, ceded conquered territory or territory ceded by way of indemnity. The territory ceased to be situated as Castine was when occupied by the British forces in the war of 1812, or as Tampico was when occupied by the troops of the United States during the Mexican war, "cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part." *Thorington* v. *Smith*, 8 Wall. 10. The Philippines were not simply occupied but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation.

In *Cross* v. *Harrison*, 16 How. 164, the question was whether goods imported from a foreign country into California after the cession were subject to our tariff laws, and this court held that they were.

In *De Lima* v. *Bidwell*, the question was whether goods imported into New York from Porto Rico, after the cession, were subject to duties imposed by the act of 1897 on "articles imported from foreign countries," and this court held that they were not. That act regulated commerce with foreign nations, and Porto Rico had ceased to be within that category; nor could territory be foreign and domestic at the same time.

Among other things it was there said: "The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union, presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. * * * This theory also presupposes that territory may be held indefinitely by the United States; that it may be

treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the non-action of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words."

No reason is perceived for any different ruling as to the Philippines. By the third article of the treaty Spain ceded to the United States "the archipelago known as the Philippine Islands," and the United States agreed to pay to Spain the sum of twenty million dollars within three months. The treaty was ratified; Congress appropriated the money; the ratification was proclaimed. The treaty-making power, the executive power, the legislative power, concurred in the completion of the transaction.

The Philippines thereby ceased, in the language of the treaty, "to be Spanish." Ceasing to be Spanish, they ceased to be foreign country. They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established. The result was the same although there was no stipulation that the native inhabitants should be incorporated into the body politic, and none securing to them the right to choose their nationality. Their allegiance became due to the United States and they became entitled to its protection.

But it is said that the case of the Philippines is to be distinguished from that of Porto Rico because on February 14, 1899, after the ratification of the treaty, the Senate resolved, as given in the margin,[1] that

[1] "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the United States to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the United States and the inhabitants of said islands." Cong. Rec. 55th Cong. 3d Sess. Vol. 32, p. 1847.

it was not intended to incorporate the inhabitants of the Philippines into citizenship of the United States, nor to permanently annex those islands.

We need not consider the force and effect of a resolution of this sort, if adopted by Congress, not like that of April 20, 1898, in respect of Cuba, preliminary to the declaration of war, but after title had passed by ratified cession. It is enough that this was a joint resolution; that it was adopted by the Senate by a vote of 26 to 22, not two thirds of a quorum: and that it is absolutely without legal significance on the question before us. The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it. What view the House might have taken as to the intention of the Senate in ratifying the treaty we are not informed, nor is it material; and if any implication from the action referred to could properly be indulged, it would seem to be that two thirds of a quorum of the Senate did not consent to the ratification on the grounds indicated.

It is further contended that a distinction exists in that while complete possession of Porto Rico was taken by the United States, this was not so as to the Philippines, because of the armed resistance of the native inhabitants to a greater or less extent.

We must decline to assume that the government wishes thus to disparage the title of the United States, or to place itself in the position of waging a war of conquest.

The sovereignty of Spain over the Philippines, and possession under claim of title had existed for a long series of years prior to the war with the United States. The fact that there were insurrections against her, or that uncivilized tribes may have defied her will did not affect the validity of her title. She granted the islands to the United States, and the grantee in accepting them took nothing less than the whole grant.

If those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected.

We do not understand that it is claimed that in carrying on the pending hostilities the government is seeking to subjugate the people of a foreign country, but, on the contrary, that it is preserving order and suppressing insurrection in territory of the United States. It follows that the possession of the United States is adequate possession under legal title, and this cannot be asserted for one purpose and denied for another. We dismiss the suggested distinction as untenable.

But it is sought to detract from the weight of the ruling in *De Lima*

v. *Bidwell* because one of the five justices concurring in the judgment in that case concurred in the judgment in *Downes* v. *Bidwell*, 182 U. S. 244.

In *De Lima* v. *Bidwell*, Porto Rico was held not to be a foreign country after the cession, and that a prior act exclusively applicable to foreign countries became inapplicable.

In *Downes* v. *Bidwell*, the conclusion of a majority of the court was that an act of Congress levying duties on goods imported from Porto Rico into New York, not in conformity with the provisions of the Constitution in respect to the imposition of duties, imposts, and excises, was valid. Four of the members of the court dissented from and five concurred, though not on the same grounds, in this conclusion. The justice who delivered the opinion in *De Lima's* case was one of the majority, and was of opinion that although by the cession Porto Rico ceased to be a foreign country, and became a territory of the United States and domestic, yet that it was merely "appurtenant" territory, and "not a part of the United States within the revenue clauses of the Constitution."

This view placed the territory, though not foreign, outside of the restrictions applicable to interstate commerce, and treated the power of Congress, when affirmatively exercised over a territory, situated as supposed, as uncontrolled by the provisions of the Constitution in respect of national taxation. The distinction was drawn between a special act in respect of the particular country, and a general and prior act only applicable to countries foreign to ours in every sense. The latter was obliged to conform to the rule of uniformity, which was wholly disregarded in the former.

The ruling in the case of *De Lima* remained unaffected, and controls that under consideration. And this is so notwithstanding four members of the majority in the *De Lima* case were of opinion that Porto Rico did not become by the cession subjected to the exercise of governmental power in the levy of duties unrestricted by constitutional limitations.

Decree reversed and cause remanded with directions to quash the information.

Mr. Justice BROWN, concurring :

I concur in the conclusion of the court in this case, and in the reasons given therefor in the opinion of the Chief Justice.

The case is distinguishable from *De Lima* v. *Bidwell*, 182 U. S. 1, in but one particular, viz., the Senate resolution of February 6, 1899. With regard to this, I would say that in my view the case would not be essentially different if this resolution had been adopted by a unanimous vote of the Senate. To be efficacious such resolution must be

considered either (1) as an amendment to the treaty, or (2) as a legislative act qualifying or modifying the treaty. It is neither.

It cannot be regarded as part of the treaty, since it received neither the approval of the President nor the consent of the other contracting power. A treaty in its legal sense is defined by Bouvier as "a compact made between two or more independent nations with a view to the public welfare" (2 Law Dic. 1136), and by Webster as "an agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the sovereigns or the supreme power of each state." In its essence it is a contract. It differs from an ordinary contract only in being an agreement between independent states instead of private parties. *Foster* v. *Neilson*, 2 Pet. 253, 314; *Head Money Cases*, 112 U. S. 580. By the Constitution (art. 2, sec. 2), the President "shall have power, by and with the advice and consent of the Senate to make treaties, provided two thirds of the Senators present concur." Obviously the treaty must contain the whole contract between the parties, and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty. If, for instance, the treaty with Spain had contained a provision instating the inhabitants of the Philippines as citizens of the United States, the Senate might have refused to ratify it until this provision was stricken out. But it could not, in my opinion, ratify the treaty and then adopt a resolution declaring it not to be its intention to admit the inhabitants of the Philippine Islands to the privileges of citizenship of the United States. Such resolution would be inoperative as an amendment to the treaty, since it had not received the assent of the President or the Spanish commissioners.

Allusion was made to this question in the *New York Indians* v. *United States*, 170 U. S. 1, 21, wherein it appeared that, when a treaty with certain Indian tribes was laid before the Senate for ratification, several articles were stricken out, several others amended, a new article added, and a proviso adopted that the treaty should have no force or effect whatever, until the amendment had been submitted to the tribes, and they had given their free and voluntary assent thereto. This resolution, however, was not found in the original or in the published copy of the treaty, or in the proclamation of the President, which contained the treaty without the amendments. With reference

to this the court observed: "The power to make treaties is vested by the Constitution in the President and the Senate, and, while this proviso was adopted by the Senate, there was no evidence that it ever received the sanction or approval of the President. It cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate, and House of Representatives. There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it. The proviso appears never to have been called to the attention of the tribes, who would naturally assume that the treaty embodied in the Presidential proclamation contained all the terms of the arrangement."

In short, it seems to me entirely clear that this resolution cannot be considered a part of the treaty.

I think it equally clear that it cannot be treated as a legislative act, though it may be conceded that under the decisions of this court Congress has the power to disregard or modify a treaty with a foreign state. This was not done.

The resolution in question was introduced as a *joint* resolution, but it never received the assent of the House of Representatives or the signature of the President. While a joint resolution, when approved by the President, or, being disapproved, is passed by two thirds of each House, has the effect of a law (Const. art. 1, sec. 7), no such effect can be given to a resolution of either House acting independently of the other. Indeed, the above clause expressly requires concurrent action upon a resolution "before the same shall take effect."

This question was considered by Mr. Attorney-General Cushing in his opinion on certain Resolutions of Congress (6 Ops. Attys.-Gen. 680), in which he held that while joint resolutions of Congress are not distinguishable from bills, and have the effect of law, separate resolutions of either House of Congress, except in matters appertaining to their own parliamentary rights, have no legal effect to constrain the action of the President or heads of departments. The whole subject is there elaborately discussed.

In any view taken of this resolution it appears to me that it can be considered only as expressing the individual views of the Senators voting upon it.

I have no doubt the treaty might have provided, as did the act of Congress annexing Hawaii, that the existing customs relations between the Spanish possessions ceded by the treaty and the United States

should remain unchanged until legislation had been had upon the subject; but in the absence of such provision the case is clearly controlled by that of *De Lima* v. *Bidwell.*

Mr. Justice GRAY, Mr. Justice SHIRAS, Mr. Justice WHITE, and Mr. Justice MCKENNA dissented, for the reasons stated in their opinions in *De Lima* v. *Bidwell*, 182 U. S. 1, 200–220; in *Dooley* v. *United States*, 182 U. S. 222, 236–243; and in *Downes* v. *Bidwell*, 182 U. S. 244, 287–347.[1]

[1] *De Lima* v. *Bidwell*, 1900, 182 U. S. 1, is the present leading case on this subject; its length prevents its insertion.

Leaving out of question its importance in constitutional and international law, it should be consulted for a collation and examination of the authorities. In *Dooley* v. *U. S.*, 1900, 182 U. S. 222, and *Armstrong* v. *U. S.*, id. 243, it was held (Justices White, Gray, Shiras, and McKenna dissenting) that duties upon imports from the U. S. to Porto Rico, collected by Military Commander and the President as Commander-in-Chief, from time of taking possession of the island until ratification of the treaty of peace, were legally exacted under war power, but the right to exact duties so imposed ceased with the ratification of the treaty. In *Downes* v. *U. S.*, 1901, 182 U. S. 244, it was held (Fuller, C. J., Harlan, Brewer, and Peckham, JJ., dissenting) that the Island of Porto Rico is "a territory appurtenant and belonging to the United States but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act (April 12, 1900) is constitutional, so far as it imposes duties upon imports from such islands and that the plaintiff cannot recover back the duties exacted in this case." Reaffirmed and applied in *Dooley* v. *U. S.*, 1901, 183 U. S. 151. As the judgment in *Downes* v. *U. S.*, of vital importance to the United States, deals largely with (the powers of Congress over the internal organization and government of) domestic territory of the United States, no abstract is here attempted. In *Huus* v. *New York & Steamship Co.*, 1901, 182 U. S. 392, it was held that vessels plying between Porto Rican ports and the U. S. mainland, engaged in "coasting," *i. e.* domestic, not foreign trade.

The following are some leading foreign cases on the subject: In the case of *Guerin*, Court of Appeal of Nancy, 1872 (Dalloz, 1872, II. p. 185), it was held that the occupation of a department of France by the troops of the enemy does not suspend therein the civil and criminal laws of France; that these continue obligatory upon all Frenchmen so long at least as they have not been expressly and specifically abrogated by the exigencies of the war. This rule was enforced in respect to the custom laws, and even in that part of the occupied territory where the Germans collected and appropriated the duties. Dalloz, 1872, II. 185, notes 3, 4.

In *Mohr & Haas* v. *Hatzfeld*, Court of Appeals of Nancy, 1872, Dalloz, 1872, II. p. 229, it was held that the military occupation of a territory confers upon the invader the right only to the usufruct and revenues of the public domain; that the French courts will not recognize as valid the sale of old trees (during the war of 1870–71) on the public domain which were reserved at the time of the annual cutting; that they are as inalienable as the soil of the forest itself. Cf. *New Orleans* v. *Steamship Co.*, 20 Wall. 387, for an exposition of American policy towards the Southern States, and for the attitude to Cuba the following two citations: "It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will upon the termination of such occupancy

Section 38. — Termination of War.

BAIN v. SPEEDWELL.

Federal Court of Appeals, 1784.

(2 *Dallas*, 40.)

This was an appeal from the Admiralty of the State of Rhode Island, where the schooner had been condemned as prize; and the record was submitted to the decision of the court, without argument. On the 24th of May, 1784, Griffin, Read, and Lowell, the presiding commissioners, delivered the following judgment:

By the court. It appearing, by the inspection of the record, that the schooner in question was captured from the British, since the operation of the preliminary articles of peace (to wit, on the day of) the condemnation cannot be sustained.

Decree reversed.[1]

advise any Government established in the island to assume the same obligations." Art. XVI. Treaty with Spain, 30 U. S. Statutes at Large, 1754–1761.

"That no property, franchises, or concessions of any kind whatever shall be granted by United States, or by any military or other authority whatever, in the Island of Cuba during the occupation thereof by the United States." 30 id. 1064, p. 1074.

In *Villasseque's Case*, Cour de Cassation, 1818 (Ortolan: Diplomatie de la Mer., 2d ed., Vol. I 324) it was decided that a crime committed by a French citizen in Spanish territory, occupied and administered by the French army, was a crime committed in a foreign country. Cf. *Neely* v. *Henkel*, 1901, 180 U. S. 109.

Hesse Cassel was conquered by the First Napoleon in 1806, and remained for about a year under his immediate control; when it was annexed to the new kingdom of Westphalia, of which it remained a part until after the battle of Leipzig in 1813. It was held in the *Elector of Hesse Cassel's Case*, that debts due the Elector were validly discharged by payment to Napoleon and receiving from him a quittance in full. (III. Phillimore's International Law, p. 841; Magoon, Military Occupation, 262–263.)

For an interesting and early case on this matter of payment, see discussion of occupation of Naples by Charles VIII. 1425 (III. Phillimore, Int. Law, p. 838). — Ed.

[1] The *Thétis* was captured twenty-nine days after the signing of the treaty of Lunéville, Feb. 9, 1801, but eight days before its ratification. It was restored on the ground of illegal capture in time of peace. Conseil des Prises, 1801, 1 Pistoye et Duverdy, 148. — Ed.

THE "MENTOR."

High Court of Admiralty, 1799.

(1 *C. Robinson*, 179.)

Judgment.— Sir W. Scott : —

The circumstances of the case, as far as it is necessary to state them, are these : The ship, being American property, was on a voyage from Havana to Philadelphia, in 1783; off the Delaware she was pursued by his Majesty's ships, the *Centurion* and the *Vulture*, then cruising off that river, under the command of the admiral on that station, Admiral Digby. All parties were in complete ignorance of the cessation of hostilities ; not only the persons on board the King's ships, but the Americans, as well those on the shore, as those on board the vessel. In the pursuit, shots were fired on both sides, and, it is alleged on the part of the British, that the ship was set on fire by her own crew, who took to the shore.

Now, I incline to assent to Dr. Lawrence's position, that if an act of mischief was done by the King's officers, though through ignorance, in a place where no act of hostility ought to have been exercised, it does not necessarily follow that mere ignorance of that fact would protect the officers from civil responsibility. If by articles, a place or district was put under the King's peace, and an act of hostility was afterwards committed therein, the injured party might have a right to resort to a court of prize to show that he had been injured by this breach of the peace, and was entitled to compensation ; and if the officer acted through ignorance, his own government must protect him : for it is the duty of governments, if they put a certain district within the King's peace, to take care that due notice shall be given to those persons by whose conduct that peace is to be maintained ; and if no such notice has been given, nor due diligence used to give it, and a breach of the peace is committed through the ignorance of those persons, they are to be borne harmless, at the expense of that government whose duty it was to have given that notice.[1]

[1] The statement of facts is omitted and only a part of the judgment is given. This case had been in the courts ten or more years previously, but no records of the proceedings were produced. On this account, and from the further fact that the present action was brought against the admiral of the station, instead of the actual wrongdoer, the court refused to give relief.

In the Treaty of Amiens, 1802, between Great Britain and France, it was stipulated that two months should be allowed for the news of the close of the war to reach

THE SCHOONER "JOHN."

COMMISSION FOR SETTLEMENT OF CLAIMS BETWEEN THE UNITED STATES AND GREAT BRITAIN, FEBRUARY 8, 1853.

(*Report of the Commission*, 427.)

UPHAM, United States Commissioner:

In the able argument addressed to us by her Majesty's counsel, the British agent, some stress has been laid on the decision of Sir William Scott (2 Dodson. 336) on a suit brought against the commander of the *Talbot* for the capture of the *John*; and that authority is considered conclusive of this claim.

But, in that case, the learned judge declined determining whether or not the claimant had a remedy elsewhere; he only decided, for reasons which he gives at length, that the captor should be personally exonerated.

On determining this question, he says: "I certainly go no further than the expressions used by me warrant, that this individual captor is not liable to this individual sufferer."

"That does not exclude a liability elsewhere, if it exists. Whether there be such a liability in the government is a question I am not called upon to examine; I have neither the proper parties nor the evidence before me. It is sufficient to observe, upon that matter, that there may be such a liability; there doubtless would be, if the government had not made due diligence in advertising the cessation of hostilities, in the quarters and at the periods stipulated, if that were practicable."

"Where property, captured after peace has taken effect, is lost by mere chance, without any fault on the part of the captor, whether an obligation is incurred to restore in value what has been taken away by

their respective cruiser in the West Indies. A British vessel was captured before the expiration of the two months, but after news of the peace had reached the captors, through British sources, the ship was restored. *The Nymph*, 1801, Conseil des Prises, Merlin: Repertoire de Jurisprudence, Vol. 25, p. 131.

The similar case of *The Swineherd* (*le Porcher*), 1 Pistoye et Duverdy, 149, was that of an English vessel captured in the Indian seas by a French privateer, after the signing of the Treaty of Amiens, but before the expiration of the five months allowed for the news of the peace to reach those seas.

In this case the English ship had been fitted out as a privateer. She sailed from Calcutta after the news of the peace had reached that place, and informed the captor of that fact. It was contended further by the claimant that the captor had received notice of the peace from a Portuguese vessel. On the other hand, it was held by the Conseil des Prises that no sufficient notice of peace had reached the captor. See Hall's Int. Law, 582, 583. — ED.

mere misfortune, the terms of the contract have not specifically provided for; and just principle seems to point another way; that, however, is not the question before me for my decision." *Schooner John, Beck, Master*, 2 Dodson, 336.

This case conflicts with the opinion of the same learned judge in *The Mentor*, 1 Robinson, 183. He there says, "that the seizure of a vessel is a belligerent right which is not exercisable in time of peace. When there is peace, a seizure, *jure belli*, is a wrongful act, and the injured party is entitled to restitution and compensation." He further says, "It is not so clear that the captor is liable to costs and damages, when peace has not been notified. The better opinion seems to be, that the captor is liable to costs and damages, and entitled to indemnification from his government, whose duty it was to have given notice."

Both these cases sustain this point, that, when there is a want of due diligence, in advertising the cessation of hostilities, the injured party is clearly entitled to indemnification; and Vattel says, also, "that those who shall, through their own fault, remain ignorant of the publication of the truce, would be bound to repair any damage they may have caused contrary to its tenor." Vattel, bk. 3, ch. 16.

There seems to be no doubt that the principle, thus laid down, is correct. But what constitutes due diligence, under such circumstances, is a question at times of difficult determination. It is, therefore, exceedingly desirable that it should be settled by the parties in advance. Vattel says, in the same section, "in order as far as possible to avoid any difficulty," on this point, "it is usual with sovereigns, in their truces, as well as treaties of peace, to assign different periods for the cessation of hostilities according to the situation and distance of places."

The question then arises, whether this assignment of different periods for the cessation of hostilities, according to the situation and distance of places, was not designed by the parties to establish the time to be holden as reasonable notice within such limits. Such clearly is the ground assigned by Vattel for such provisions in treaties. What would be reasonable, can be determined just as well before the treaty as after, and the whole tenor of the treaty, in this case, goes to show that the contracting parties had this question in view, in establishing the various periods within which peace should take place in different localities.

The treaty provides that, "immediately after ratification, orders shall be sent to the armies, squadrons, officers, subjects, and citizens of the two powers, to cease from all hostilities; and, to prevent all causes of complaint which may arise on account of prizes, which may be taken at sea after said ratification, it is reciprocally agreed, that all vessels and effects, which may be taken after the space of twelve days

from the said ratification, upon all ports of the coast of North America, from the latitude of 23° north, to the latitude of 50° north, and as far eastward in the Atlantic ocean as the 36° of west longitude from the meridian of Greenwich, shall be restored on each side; that the time shall be thirty days in all other parts of the Atlantic ocean, north of the equator, and the same time for the British and Irish channels, for the Gulf of Mexico, and all parts of the West Indies; forty days for the North Seas, for the Baltic, and for all parts of the Mediterranean; sixty days for the Atlantic ocean, south of the equator, as far as the latitude of the Cape of Good Hope; ninety days for every part of the world south of the equator, and one hundred and twenty days for all the other parts of the world without exception." United States Statutes at Large, Vol. 8, p. 219. These several periods were undoubtedly agreed upon as equivalent to notice that peace existed within the prescribed limits. It cannot be supposed that the contending parties designed to append to these periods a further indefinite, uncertain time, as to what should constitute due diligence in giving notice, or to restrain or limit the fact in its consequences, that peace should exist at the times named.

After the periods thus agreed upon, the obligation to cease from hostilities was imperative.

Such being the case, we have the true starting-point from which to consider the question of the respective rights of the parties. It is manifest that collisions might then occur without the imputation of any wilful wrong in the violation of the compact entered into. The injury would, however, exist, and the actual loss sustained should, on every principle of equity and justice, as well as of compact, be fully met.

The stipulation was, therefore, entered into by the parties, that "all vessels and effects" that should be taken after the several times specified "should be restored." The question then arises, what interpretation we shall place on this provision? Does it mean that vessel property merely shall be returned, and where this has become impracticable that no restitution or satisfaction shall be had? I cannot believe that such was the intent of the parties. They acknowledge themselves bound by a constructive notice of the peace, and it was their own fault that they did not take time enough, or did not use diligence enough to give actual notice of the peace "to their armies, squadrons, officers, subjects, and citizens," as was specially provided should be done by the treaty.

Under such circumstances, the doctrine of Vattel, adopted by Sir William Scott, applies, "that those who through their own fault remain ignorant of the publication of the truce are bound to repair any damage they may have caused contrary to its tenor."

The party injured is in the same situation as a neutral whose vessel has been seized and destroyed as the property of a hostile power, where it is holden the neutral can only be justified by a full restitution in value. 1 Wildman, Vol. 2, p. 175.

There is no other measure of damage that justly meets the requirements of the case. The treaty provides not only that "all vessels," but also "their effects," which may be taken, after a certain specified number of days, within certain described limits, shall be restored on either side. But if the effects of a vessel, consisting of provisions or other articles, are taken and consumed, or are otherwise disposed of, so they cannot be restored specifically, it will hardly be contended that no remuneration is to be made.

If this be so, the rule would equally follow in relation to the vessel. Restoration and restitution are synonymous. One meaning of the word "restore," as laid down by Webster is, "to make restitution or satisfaction for a thing taken, by returning something else, or something of different value," and this is the meaning which should be rightfully attached to the word in the treaty.

I do not understand that this is, in reality, denied; but the position is taken by Great Britain in this case, that she is relieved from restoring the vessel, for the reason that it was subsequently cast away and lost by the act of God, and no one is accountable.

If the case can be brought within this principle the excuse might avail, but there are circumstances connected with it that preclude such defence. No one can plead the destruction of property as the act of God, who is wrongfully in the use and control of such property. He is a wrong-doer from the outset; he has converted the property from the instant of possession, and the subsequent calamity which may happen, however inevitable it may be, is no excuse for its loss.

The *John* was in the rightful pursuit of a lawful voyage, at a time and place when peace existed by the express stipulations of the parties, after taking such period for notice as they held that the case required.

She had pursued her course northwardly some four or five hundred miles out from harbor, on her way to her destined port. She was there seized, placed under the charge of new men, and her course was directly reversed, until she was taken back to the West Indies, and through mismanagement, or misadventure, was run on shore and lost.

It may have been the ordinary accident of the seas, or may not; but, in any event, she was taken there without right, and subjected to risks to which she was not legally and justly liable. The plea that she was lost by the act of God is not, under the circumstances, admissible. The vessel itself cannot be restored, but such compensation and restitution should be made as the nature of the case admits of.

In the argument, considerable stress has been laid on a quotation in Kent and Wheaton, said to be founded on Grotius, that where collisions arise after peace exists, the governments "are not amenable in damages, but it is their duty to restore what has been captured, but not destroyed." The citation from Grotius is, however, erroneous. He merely says, in the section referred to, that if any acts be done, in violation of the truce, before notice can be given, "the government will not be liable to punishment, but the contracting parties will be bound to make good the damage." Whewell's Grotius, lib. 3, ch. 21, § 5.

What shall be the precise effect, as a matter of notice, where different periods of time are stipulated in which peace shall take place, does not seem to have been fully considered and settled. If it shall be held as an acknowledgment of notice, then every subsequent act of violation of it is the act of a wrong-doer, and full compensation follows of necessity. I can see no possible mode of avoiding the justness or soundness of the construction at which we have arrived, but think it should prevail on every ground of public policy and right interpretation of international compacts of this character.

I am happy to say that my colleague, though he hesitates somewhat as to the views presented, waives his objection to the allowance of the claim, except on the score of interest, and this question is to be submitted to the umpire.

Interest was allowed.[1]

"NEUSTRA SEÑORA DE LOS DOLORES."

High Court of Admiralty, 1809.

(*Edwards*, 60.)

This was the case of a Spanish ship which had been captured before Spanish hostilities, and restored with costs and damages; but no further proceedings took place at the time, in consequence of the breaking out of the war between the two countries. An application was now made to the court for a reference to the registrar and merchants, on the ground that hostilities having ceased, the Spanish claimant was entitled to the benefit of the former decree for costs and damages.

[1] For a very careful and elaborate consideration of the captor's liability to the claimant, in cases of probable cause and unlawful capture, see T. Pemberton Leigh's [Lord Kingsdown's] judgment in *The Ostee*, 1855, 9 Moore, P. C. 150. This case should likewise be considered in connection with § 48 on Prize Courts. — Ed.

Judgment. — Sir WILLIAM SCOTT: —

I am clearly of the opinion that the judgment is not sustainable; it is true that the intervention of hostilities puts the property of the enemy in such a situation that confiscation may ensue, but unless some step is taken for that purpose, unless there is some legal declaration of the forfeiture, the right of the owner revives on the return of peace. This is an acknowledged principle in the Courts of Common Law, borrowed, in all probability, from the general law of nations, and I see no reason for any distinction here. We know that, in captures at sea, the general law is, that the bringing *infra præfidia*, and even a sentence of condemnation, is necessary to convert the property; and although in some instances positive institutions have determined that a possession of a certain number of hours is sufficient, yet this proceeds upon the ground that a possession of so many hours is an evidence of firm possession. Here there was no bodily possession, nor indeed could there be; but still some judicial act might have been done declaratory of the forfeiture to the Crown of those rights which vested in the claimant under the decree for costs and damages. It appears, however, that no step was taken for this purpose on the part of the Crown; and I am, therefore, of the opinion that the rights of the Spanish proprietor do revive, and I refer it to the registrar and merchants to ascertain the amount of the compensation to which he is entitled under the decree.[1]

THE "PROTECTOR."

SUPREME COURT OF THE UNITED STATES, 1871.

(12 *Wallace*, 700.)

The question in this case was whether the suit was barred by the statute of limitations in Alabama. As the statute did not run during the period of the war, it was necessary to determine precisely the dates of beginning and end of the war.

Judgment,—CHASE, C. J.:—

"The question, in the present case is, when did the rebellion begin and end? In other words, what space of time must be considered as excepted from the operation of the statute of limitations by the war of the rebellion?

"Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the

[1] Compare *The Schooner Sophie*, 1805, 6 C. Rob. 138, in which the defective title of the neutral purchaser was cured by an intervening peace. — ED.

country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken.

"The proclamation of intended blockade by the President may, therefore, be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second. But the war did not begin or close at the same time in all the States. There were two proclamations of intended blockade: the first of the 19th of April, 1861 (12 Stat. at Large, 1258), embracing the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas; the second, of the 27th of April, 1861 (12 Stat. at L., 1259), embracing the States of Virginia, and North Carolina; and there were two proclamations declaring that the war had closed; one issued on the 2d of April, 1866, (14 Stat. at Large, 811), embracing the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas, and the other issued on the 20th of August, 1866 (13 Stat. at Large, 814), embracing the State of Texas.

"In the absence of more certain criteria, of equally general application, we must take the dates of these proclamations as ascertaining the commencement and the close of the war in the states mentioned in them. Applying this rule to the case before us, we find that the war began in Alabama on the 19th of April, 1861, and ended on the 2d of April, 1866. More than five years, therefore, had elapsed from the close of the war till the 17th of May, 1871, when this appeal was brought. The motion to dismiss, therefore, must be

"Granted." [1]

[1] See *Brown* v. *Hiatts*, 1872, 15 Wallace, 177.

In the case of *Philips* v. *Hatch*, 1 Dillon, 571 (1871), the United States Circuit Court for Iowa held that a contract entered into in the spring of 1866 between a resident of the State of Iowa and a resident of the State of Texas, was void as a contract between enemies. — Ed.

CHAPTER III.

RELATIONS BETWEEN BELLIGERENTS AND NEUTRALS.

Section 39. — Belligerent Capture in Neutral Waters.

THE "ANNA."

High Court of Admiralty, 1805.

(5 *C. Robinson*, 373.)

This was the case of a ship under American colors, with a cargo of logwood, and about 13,000 dollars on board, bound from the Spanish main to New Orleans, and captured by the *Minerva* privateer near the mouth of the river Mississippi. A claim was given under the direction of the American Minister for the ship and cargo, as taken within the territory of the United States, at the distance of a mile and a half from the western shore of the principal entrance of the Mississippi, and within view of a port protected by a gun, and where is stationed an officer of the United States.

Judgment. — Sir W. Scott:[1] —

"When the ship was brought into this country a claim was given of a grave nature, alleging a violation of the territory of the United States of America. This great leading fact has very properly been made a matter of much discussion, and charts have been laid before the court to show the place of capture, though with different representations from the adverse parties. The capture was made, it seems, at the mouth of the river Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is 'terræ dominium finitur, ubi finitur armorum vis,' and since the introduction of fire-arms that distance has usually been recognized to be about three miles from the shore. But it so happens in this case, that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the river, which form a kind of portico to the main-land. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of 'no man's land,' not of con-

[1] Part of the judgment of this remarkable and learned judge is omitted. — Ed.

sistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds' nests. It is argued that the line of territory is to be taken only from the Balise, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which, indeed, they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law. *Quod vis fluminis de tuo prædio detraxerit*, and *vicino prædio attulerit, palam tuum remanet*, even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the main-land, and as comprised within the bounds of territory.

"If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

"I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river. But it is said that the act of capture is to be carried back to the commencement of the pursuit, and that if a contest begins before, it is lawful for a belligerent cruiser to follow, and to seize his prize within the territory of a neutral state. And the authority of Bynkershoek is cited on this point. True it is, that that great man does intimate an opinion of his own to that effect; but with many qualifications, and as an opinion, which he did not find to have been adopted by any other writers. I confess I should have been inclined to have gone along with him, to this extent, that if a cruiser, which had before acted in a manner entirely unexceptionable, and free from all violation of territory, had summoned a vessel to submit to examination and search, and that vessel had fled to such places as these, entirely uninhabited, and the cruiser had without injury or annoy-

ance to any person whatever, quietly taken possession of his prey, it would be stretching the point too hardly against the captor, to say that on this account only it should be held an illegal capture. If nothing objectionable had appeared in the conduct of the captors before, the mere following to such a place as this is, would, I think, not invalidate a seizure otherwise just and lawful.

"But that brings me to a part of the case, on which I am of opinion that the privateer has laid herself open to great reprehension. Captors must understand that they are not to station themselves in the mouth of a neutral river, for the purpose of exercising the rights of war from that river, much less in the river itself. It appears from the privateer's own log-book that this vessel has done both; and as to any attempt to shelter this conduct under the example of King's ships, which I do not believe, and which, if true, would be no justification to others, captors must, I say, be admonished, that the practice is altogether indefensible, and that if King's ships should be guilty of such misconduct, they would be as much subject to censure as other cruisers.

"It is unnecessary to go over all the entries in the log. The captors appear by their own description *to have been standing off and on*, obtaining information at the Balise, overhauling vessels in their course down the river, and making the river as much subservient to the purposes of war, as if it had been a river of their own country. This is an inconvenience which the states of America are called upon to resist, and which this court is bound on every principle to discourage and correct.

"With respect to one vessel, it appears that the *Bilboa*, under Spanish colors, and an undoubted Spanish ship, had been captured and carried into the river; and it was stated in an affidavit which was exhibited to account for the absence of the usual witnesses in that case, *that the prisoners had escaped.* The cause was brought on upon the evidence of the releasing witnesses under this representation. It now appears by an entry in this log, '*that the prisoners were set on shore;*' an act highly unjustifiable, in its own nature, independent of the deception with which it has been accompanied. The prisoners are the King's prisoners, and captors are particularly enjoined by the instructions not to release any prisoners belonging to the ships of the enemy, and they violate their duty whenever they do. When I advert to the imposition that has been put upon the court in that transaction, how can I trust myself to any representation coming from the same persons. Indeed, I think, I can perceive strong traits of bad faith running throughout the whole conduct of the captors in the present case. In answer to the complaint that

has been made against the captors for bringing this prize to England, it was said, that it was done at the desire of the master of the captured vessel; though in the affidavit of the master, which is not contradicted, it is sworn, 'that the captors offered to set him on shore, but that he refused to be separated from his cargo.'

"The conduct of the captors has on all points been highly reprehensible. Looking to all the circumstances of previous misconduct, I feel myself bound to pronounce, that there has been a violation of territory, and that as to the question of property, there was not sufficient ground of seizure; and that these acts of misconduct have been further aggravated, by bringing the vessel to England, without any necessity that can justify such a measure. In such a case it would be falling short of the justice due to the violated rights of America, and to the individuals who have sustained injury by such misconduct, if I did not follow up the restitution which has passed on the former day, with a decree of costs and damages." [1]

[1] In *The Twee Gebroeders*, 1800, 3 C. Rob. 162, 164, the same great judge said: "I am of opinion that no use of a neutral territory for the purposes of war is to be permitted. I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but that no proximate acts of war are in any manner to be allowed to originate on neutral grounds; and I cannot but think that such an act as this, that a ship should station herself on neutral territory, and send out her boats (as was done in this case) on hostile enterprises, is an act of hostility much too immediate to be permitted. For, suppose that even a direct hostile use should be required to bring it within the prohibition of the law of nations, nobody will say that the very act of sending out boats to effect a capture is not itself an act directly hostile, not complete, indeed, but inchoate, and clothed with all the characters of hostility. If this could be defended, it might as well be said that a ship lying in a neutral station might fire shot on a vessel lying out of the neutral territory; the injury in that case would not be consummated, nor received on neutral ground; but no one would say that such an act would not be an hostile act, immediately commenced within the neutral territory. And what does it signify to the nature of the act, considered for the present purpose, whether I send out a cannon-shot which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat armed and manned, to effect the very same thing at the same distance? It is in both cases the direct act of the vessel lying in neutral ground. The act of hostility actually begins, in the latter case, within the launching and manning and arming the boat that is sent out on such an errand of force."

See also an early American case, *Soult* v. *L'Africaine*, 1804, Bee's R. 204.

"In 1814 an American privateer, the *General Armstrong*, was found at anchor in Fayal harbor by an English squadron. A boat detachment from the latter approached the privateer and was fired upon. The next day one of the vessels of the squadron took up position near the *General Armstrong* to attack her. The crew, not finding themselves able to resist, abandoned and destroyed her. The United States alleged that the Portuguese governor had failed in his duty as a neutral, and demanded a large compensation for the owners of the privateer. After much correspondence the affair was submitted in 1851 to the arbitration of the President of the French Republic, who held that as Captain Reid, of the privateer, 'had not applied at

THE "ANNE."

SUPREME COURT OF THE UNITED STATES, 1818.

(3 *Wheaton*, 435.)

This was the case of a British ship captured while lying at anchor near the Spanish part of the island of St. Domingo, by the American privateer *Ultor*.[1]

STORY, J.:—

"The claim of the Spanish government for the violation of its neutral territory being thus disposed of, it is next to be considered whether the British claimant can assert any title founded upon that circumstance.

"By the return of peace, the claimant became rehabilitated with the capacity to sustain a suit in the courts of this country; and the argument is, that a capture made in a neutral territory is void; and, therefore, the title by capture being invalid, the British owner has a right to restitution. The difficulty of this argument rests in the incorrectness of the premises. A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him and him only, is it to be considered void. The enemy has no rights whatsoever, and if the neutral sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. This is the clear result of the authorities; and the doctrine rests on well established principles of public law.

"There is one other point in the case which, if all other difficulties

the beginning to the neutral, but had used force to repel an improper aggression of which he stated himself to be the object, he had himself disregarded the neutrality of the territory in which he was, and had consequently released its sovereign from all obligations to protect him otherwise than by his good offices; that from that moment the Portuguese Government could not be responsible for the results of a collision which had taken place in contempt of its sovereign rights.'" Hall's Int. Law, 648-649. See criticism of the award in Dana's Wheaton, note 208, p. 526, and for an elaborate account of the origin, history and final settlement of this interesting episode, see 2 Moore's Int. Arb. 1071-1132.

In an early French case, *The Perle* (Conseil des Prises, "An VIII," 1 Pistoye et Duverdy, 100), it was decided that a belligerent capture in neutral waters is illegal whether under the guns of a fort, or on the undefended coast; and the captured ship will be restored by the courts (French) of the captor's country. — ED.

[1] Statement of the case is much abbreviated and only a part of the opinion is given. — ED.

were removed, would be decisive against the claimant. It is a fact, that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self-defence. The privateer had an equal title with herself to the neutral protection, and was in no default in approaching the coast without showing her national character. It was a violation of that neutrality which the captured ship was bound to observe, to commence hostilities for any purpose in these waters; for no vessel coming thither was bound to submit to search, or to account to her for her conduct or character. When, therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign.

"The conclusion from all these views of the case is, that the ship and cargo ought to be condemned as good prize of war." [1]

[1] In *The Eliza Ann*, 1813, 1 Dod. 244, three American ships were seized in Hanoe Bay, by the British ship *Vigo*. A claim was given, under the direction of the Swedish minister, for the ships and cargoes "as taken within one mile of the mainland of Sweden * * * contrary to and in violation of the law of nations, and the territory and jurisdiction of his said [Swedish] Majesty." On these facts, Sir Wm. Scott said: "A claim has been given by the Swedish Consul, for these ships and cargoes, as having been taken within the territories of the King of Sweden, and in violation of his territorial rights. This claim could not have been given by the Americans themselves; for it is the privilege, not of the enemy, but of the neutral country, which has a right to see that no act of violence is committed within its jurisdiction. When a violation of neutral territory takes place, that country alone, whose tranquillity has been disturbed, possesses the right of demanding reparation for the injury which she has sustained [*The Purissima Conception*, 1805, 6 C. Rob. 45; *The Diligentia*, 1814, 1 Dod. 404, 412]. It is a principle that has been established by a variety of decisions, both in this and in the Superior Court (*The Etrusco*, Lords, 1795), that the enemy, whose property has been captured, cannot himself give the claim, but must resort to the neutral for his remedy. Acts of violence by one enemy against another are forbidden within the limits of a neutral territory, unless they are sanctioned by the authority of the neutral state, which it has the power of granting to either of the belligerents, subject, of course, to a responsibility to the other. A neutral state may grant permission for such acts beforehand, or acquiesce in them after they shall have taken place, or it may, as has been done in the present instance, step forward and claim the property."

In the case of *The Lilla*, 2 Sprague, 1862, 177, it is said that, "it is undoubtedly true that no private person can rest a claim for the restoration of prize in the courts of the captor on the ground that the capture was made in neutral waters, and that the neutral nation whose rights have been infringed alone can interpose."

In the case of *The Adela*, 1867, 6 Wall. 266, Chief Justice Chase, in delivering the judgment of the court, said: "It is claimed that the capture took place in British waters. It was made, in fact, near Great Abaco Island, which belongs to Great

THE "FLORIDA."

SUPREME COURT OF THE UNITED STATES, 1879.

(101 *United States*, 37.)

Mr. Justice SWAYNE, after stating the facts, delivered the opinion of the court.

The legal principles applicable to the facts disclosed in the record are well settled in the law of nations, and in English and American jurisprudence. Extended remarks upon the subject are, therefore, unnecessary. See Grotius, De Jure Belli, b. 3, c. 4, sect. 8; Bynkershoek, 61, c. 8; Burlamaqui, vol. ii. pt. 4, c. 5, sect. 19; Vattel, b. 3, c. 7, sect. 132; Dana's Wheaton, sect. 429 and note 208; 3 Rob. Ad. Rep. 373; 5 id. 21; *The Anne*, 3 Wheat. 435; *La Amistad de Rues*, 5 id. 385; *The Santissima Trinidad*, 7 id. 283, 496; *The Sir William Peel*, 5 Wall. 517; *The Adela*, 6 id. 266; 1 Kent, Com. (last ed.), pp. 112, 117, 121.

Grotius, speaking of enemies in war, says: "But that we may not kill or hurt them in a neutral country, proceeds not from any privileges attached to their persons, but from the right of the prince in whose dominions they are."

A capture in neutral waters is valid as between belligerents. Neither a belligerent owner nor an individual enemy owner can be

Britain; but the evidence is by no means convincing that it was made within three miles from the land. On the contrary, while it is not, perhaps, certain that *The Adela* was without the line of neutral jurisdiction when first required to lay to by the Quaker City, it cannot be doubted that she had passed beyond it when she was actually captured. If, however, the capture had been actually made in neutral waters, that circumstance would not, of itself, prevent condemnation, especially in a case of capture made in good faith, without intent to violate neutral jurisdiction, or knowledge that any neutral jurisdiction was in fact infringed, and in the absence of all intervention or claim on the part of the neutral government (*The Etrusco*, 3 Robinson, 31; *Vrouw Anna Catharina*, 5 id. 144). 'It might,' as was observed in the case of *The Sir William Peel* (5 Wallace, 535), 'constitute a ground of claim by the neutral power whose territory had suffered trespass, for apology or indemnity. But neither an enemy, nor a neutral acting the part of a enemy, can demand restitution on the sole ground of capture in neutral waters.'"

In the case of the British ship *Grange*, captured in Delaware Bay by a French privateer (1793), it was held by Attorney-General Randolph (1 Op. Att.-Gen. 15), that if the captured ship was brought within the jurisdiction of the United States, it was their duty as neutrals to restore her to the owners. To the same effect, see *La Estrella*, 1819, 4 Wheaton, 298. — ED.

heard to complain. But the neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored.

The latter was not done in this case because the captured vessel had been sunk and lost. It was, therefore, impossible.

The libellant was not entitled to a decree in his favor, for several reasons.

The title to captured property always vests primarily in the government of the captors. The rights of individuals, where such rights exist, are the results of local law or regulations. Here, the capture was promptly disavowed by the United States. They, therefore, never had any title.

The case is one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it. *Phillips* v. *Payne*, 92 U. S. 130.

These things must necessarily be so, otherwise the anomaly would be possible, that, while the government was apologizing and making reparation to avoid a foreign war, the offending officer might, through the action of its courts, fill his pockets with the fruits of the offence out of which the controversy arose. When the capture was disavowed by our government, it became for all the purposes of this case as if it had not occurred.

Lastly, the maxim, "*ex turpi causa non oritur actio*," applies with full force. No court will lend its aid to a party who founds his claim for redress upon an illegal act.

The Brazilian Government was justified by the law of nations in demanding the return of the captured vessel and proper redress otherwise. It was due to its own character, and to the neutral position it had assumed between the belligerents in the war then in progress, to take prompt and vigorous measures in the case, as was done. The commander was condemned by the law of nations, public policy, and the ethics involved in his conduct.

Decree affirmed.[1]

[1] See Hall, Int. Law, 644–645, for subsequent action of United States; Dana's Wheaton, notes 208, 209, pp. 524–528.

On this whole subject, see note to *The Twee Gebroeders* in Tudor, Mercantile Cases, 3d ed. 879–888. — Ed.

Section 40. — Equipment of Vessels of War in Neutral Territory.

UNITED STATES NEUTRALITY ACTS OF 1794 AND 1818.

(*U. S. Statutes at Large*, I., 381, *and Revised Stat.*, § 5289.)

Act of June 5, 1794:

Section 3.—"If any person shall within any of the ports, harbors, bays, rivers, or other waters of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state [or of any colony, district or people], to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state [or of any colony, district or people], with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid, every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than five thousand [ten thousand by the act of 1818] dollars, and the term of imprisonment shall not exceed three years, and every such ship or vessel with her tackle, apparel and furniture together with all materials, arms, ammunition and stores which may have been procured for the building and equipment thereof shall be forfeited, one-half to the use of any person who shall give information of the offence, and the other half to the use of the United States.

Section 7.—By this section the President is authorized to employ the land and naval forces or militia to execute the law.

On account of the complaints of Spain and Portugal (1815–17), of infractions of neutrality on the part of citizens of the United States in the war which those states were then waging with their revolted South American colonies, President Madison sent a special message on the subject to Congress, and the result was the more stringent act of April 20, 1818. From a suggestion of the Spanish Minister,

that the South American provinces in revolt, and not recognized as independent, might not be included in the word "State," the words "colony, district, or people," were added, as given in brackets above. The new clauses of the act of 1818 of chief importance are those authorizing the detention of vessels on suspicion, and requiring the owners to give bonds on clearance.

Act of 1818 (Revised Statutes, § 5289):

SECTION 10.—"The owners or consignees of every armed vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof, shall, before clearing out the same, give bond to the United States, with sufficient sureties, in double the amount of the value of vessel and cargo on board, including armament, conditioned that the vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace."

SECTION 11.—"The several collectors of customs shall detain any vessel manifestly built for warlike purposes, and about to depart the United States, the cargo of which principally consists of arms and munitions of war, when the number of men shipped on board, or other circumstances, render it probable that such vessel is intended to be employed by the owners to cruise or commit hostilities upon the subjects, citizens, or property of any foreign prince, etc., with whom the United States are at peace, until the decision of the President is had thereon, or until the owner gives such bond and security as is required of the owners of armed vessels by the preceding section."

BRITISH FOREIGN ENLISTMENT ACTS, OF 1819 AND 1870.

(59 *Geo.* III., *c.* 69, *and* 33 *and* 34 *Vict.*, 90.)

Act of July 3, 1819.—SECTION 7.

"If any person, within any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, shall, without the leave and license of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out, or arm, or attempt or endeavor to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with intent, or in order that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate,

or of any foreign colony, province, or part of any province, or people; or if any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people, as a transport or store-ship, or with intent to cruise or commit hostilities against any prince, state, or potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province, or part of any province or country, or against the inhabitants of any foreign colony, province, or part of any province or country, with whom His Majesty shall not then be at war; or shall, within the United Kingdom, or any of His Majesty's dominions, or in any settlement, colony, territory, island, or place belonging or subject to His Majesty, issue or deliver any commission for a ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid, every such person so offending shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the court in which such offender shall be convicted; and every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores, which may belong to or be on board of any such ship or vessel, shall be forfeited, and it shall be lawful for any officer of His Majesty's customs or excise, or any officer of His Majesty's navy, who is by law empowered to make seizures, for any forfeiture incurred under any of the laws of customs, or excise, or the laws of trade and navigation, to seize such ships and vessels aforesaid, and in such places and in such manner in which the officers of His Majesty's customs or excise, and the officers of His Majesty's navy are empowered respectively to make seizures under the laws of customs and excise, or under the laws of trade and navigation; and that every such ship and vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to or be on board of such ship, or vessel, may be prosecuted and condemned in the like manner, and in such courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues of customs and excise, or of the laws of trade and navigation.

Section 8 imposes penalties for the augmentation of force in British ports.

The defect in this act was in the procedure under it rather than in the intention of the act itself. The evidence required in order to arrest or detain a vessel must be sufficient to satisfy a jury of the probable breach of the provisions of the act; and such evidence

may be difficult to obtain. The local officers were wary of taking action for which they might be held liable in damages. The act of 1870 removed this defect of procedure, as well as any ambiguity there might be in the act itself. The question of the breach of the act is not to be determined by the mere "intent" of the builder.

Act of 1870:

Section 8.—"If any person within Her Majesty's dominions, etc., (1) Builds or agrees to build, or causes to be built, any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or

"(2) Issues or delivers any commission for any ship with intent or knowledge, etc.; or

"(3) Equips any ships with intent or knowledge, etc.; or

"(4) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, etc.

"Such persons shall be deemed to have committed an offence against this Act, etc."

Section 23 empowers the Secretary of State on "reasonable and probable cause for believing" that a ship is being built contrary to this Act, to issue a warrant to seize and search such ship and to detain the same until it has been either condemned or released by process of law, or in manner hereinafter mentioned.

Section 24 provides that "where it is represented to any local authority" that there is reasonable and probable cause for believing that a ship has been or is being built, commissioned or equipped contrary to this Act, it shall be the duty of such local authority to detain such ship, and forthwith to communicate the fact of such detention to the Secretary of State or chief executive authority, who may then issue a warrant for detention, or release the vessel.

UNITED STATES v. GUINET.

United States Circuit Court, Pennsylvania District, 1795.

(2 *Dallas*, 321)

Patterson, Justice: — This is an indictment against John Etienne Guinet, for being, knowingly, concerned in furnishing, fitting out, and arming *Les Jumeaux*, in the port and river Delaware, with intent that she should be employed in the service of the French Republic, to cruise, or commit hostilities, upon the subjects of Great Britain, with whom the United States are at peace: And it is the province of the

jury to inquire, whether the proof exhibited on the trial, has fully maintained the charge contained in the indictment.

Much has been said upon the construction of the 3d and 4th sections of the act of Congress; but the court is clearly of opinion, that the 3d section was meant to include all cases of vessels, armed within our ports by one of the belligerent powers, to act as cruisers against another belligerent power in peace with the United States. Converting a ship from her original destination, with intent to commit hostilities; or in other words, converting a merchant ship into a vessel of war, must be deemed an original outfit; for the act would, otherwise, become nugatory and inoperative. It is the conversion from the peaceable use, to the warlike purpose, that constitutes the offence.

The vessel in question arrived in this port, with a cargo of coffee and sugar, from the West Indies; and so appears to have been employed by her owner with a view to merchandise, and not with a view to war. The inquiry, therefore, is limited to this consideration, whether, after her arrival, she was fitted out, in order to cruise against any foreign nation, being at peace with the United States. It is true, she left the wharf with only four guns, the number that she had brought into the port; but it is equally true, that when she had dropped to some distance below, she took on board three or four guns more, a number of muskets, water-casks, &c.; and, it is manifest, that other guns were ready to be sent to her by the pilot boat. These circumstances clearly prove a conversion from the original commercial design of the vessel, to a design of cruising against the enemies of France; and, of course, against a nation at peace with the United States, since the United States are at peace with all the world. Nor can it be reasonably contended, that the articles thus put on board the vessel were articles of merchandise; for, if that had been the case, they would have been mentioned in her manifest, on clearing out of the port, whereas it is expressly stated, that she failed in ballast. If they were not to be used for merchandise, the inference is inevitable, that they were to be used for war. No man would proclaim on the house-top, that he intended to fit out a privateer: the intention must be collected from all the circumstances of the transaction, which the jury will investigate, and on which they must decide. But if they are of opinion, that it was intended to convert this vessel from a merchant ship into a cruiser, every man who was knowingly concerned in doing so, is guilty in the contemplation of the law.

It will only, then, be necessary to ascertain, how far the defendant was knowingly concerned; for, though he were concerned, if he did not act with a knowledge of the real object, he would be innocent. It has been alleged in his defence that he was merely an interpreter; and if, in fact,

he had appeared in that character alone, we should not have thought it a sufficient ground for conviction. But the jury will collect from the other parts of the transaction, whether this is not used as a mask to cover his efficient agency in the equipment of the vessel. He carried orders from the owner to the ship carpenter; he told the pilot boy at what time the guns should be taken on board his boat, to be carried to the ship; the account found in his possession states charges for supplies of cannon, ball, muskets, and commissions for services; and the whole is conducted in a secret and mysterious manner, under the shade of night. Would he have acted this part as a mere interpreter? If it had been fair mercantile business, involving nothing repugnant to our laws, would it have been so much a work of darkness? This alone casts a gloom over the transaction, that will impress every just and ingenuous mind with an idea of fraud and delinquency.

If the defendant has been concerned in the offence, there is no doubt that it is effected as far as it was in his power to complete it. The illegal outfit of the vessel was accomplished; and that an additional number of cannon was not sent to augment her force, was not owing to his respect to the laws, but to the vigilance of the public police.

Upon the whole, the jury will consider the indictment; and give such a verdict as shall comport with evidence and law.

Verdict — Guilty.

UNITED STATES v. RICHARD PETERS.

Supreme Court of the United States, 1795.

(3 *Dallas*, 121.)

Rutledge, Chief Justice: — We have consulted together on this motion; and, though a difference of sentiment exists, a majority of the court are clearly of opinion, that the motion ought to be granted. Therefore,

Let a prohibition issue.

The prohibition issued, accordingly, in the following form:

"United States, S.S.:

The President of the United States to the honorable Richard Peters, Esquire, Judge of the District Court of the United States, in and for the Pennsylvania district: It is shown to the judges of the Supreme Court of the United States, by Samuel B. Davis, That whereas by the laws of nations, and the treaties subsisting between the United States and the Republic of France, the trial of prizes

taken on the high seas, without the territorial limits and jurisdiction of the United States, and brought within the dominions and jurisdiction of the said republic, for legal adjudication by vessels of war belonging to the sovereignty of the said republic, acting under the same, and of all questions incidental thereto, does of right, and exclusively, belong to the tribunals and judiciary establishments of the said republic, and to no other tribunal, or tribunals, court, or courts, whatsoever: And whereas by the said law of nations, and treaties aforesaid, the vessels of war belonging to the said French Republic, and the officers commanding the same, cannot, and ought not, to be arrested, seized, attached, or detained, in the ports of the United States, by process of law, at the suit or instance of individuals, to answer for any capture or captures, seizure or seizures, made on the high seas, and brought for legal adjudication into the ports of the French Republic, by the said vessels of war, while belonging to, and acting under the authority and in the immediate service of the said republic: And whereas by the laws and treaties aforesaid, the District Courts of the United States have not, and ought not, to entertain jurisdiction or hold plea of such captures, made as aforesaid, under the above circumstances: And whereas by the laws of nations, the vessels of war of belligerent powers, duly by them authorized, to cruise against their enemies, and to make prize of their ships and goods, may, in time of war, arrest and seize the vessels belonging to the subjects or citizens of neutral nations, and bring them into the ports of the sovereign under whose commission and authority they act, there to answer for any breaches of the laws of nations, concerning the navigation of neutral ships, in time of war; and the said vessels of war, their commanders, officers and crews, are not amenable before the tribunals of neutral powers for their conduct therein, but are only answerable to the sovereign in whose immediate service they were, and from whom they derived their authority: And whereas, on or before the twentieth day of May, now last past, the said Samuel B. Davis, was, and now is, a lieutenant of ships in the navy of the said French Republic, and commander of a corvette, or vessel of war, called the *Cassius*, then, and now, the property of the said republic, and in her immediate service; and on the said twentieth day of May, was duly commissioned, by and under the authority of the said republic, to cruise against her enemies, and make prize of their ships (as by his commission and the certificate of the minister plenipotentiary of the said republic to the United States, to the court shown, more fully appears). Nevertheless a certain James Yard, of the city of Philadelphia, merchant, not ignorant of the premises, but contriving and intending to disturb the peace and harmony subsisting between the

United States and the French Republic, and him, the said Samuel B. Davis, wrongfully to aggrieve and oppress, and draw to another proof, him, the said Samuel B. Davis, and the said corvette, or vessel of war, of the French Republic, the *Cassius*, in the port of Philadelphia, under the protection of the laws of nations, and of the faith of treaties, has, by process out of the District Court of the United States, in and for the district of Pennsylvania, attached and arrested him, the said Samuel B. Davis, and the said corvette, or vessel of war, the *Cassius*, before the judge of the said District Court, contrary to the said law of nations, and treaties, and against the due form of the laws of the United States, hath unjustly drawn in plea, to answer to a certain libel, by him, the said James Yard, against him, the said Samuel B. Davis, and against the said corvette, or vessel of war, the *Cassius*, her tackle, apparel, and furniture, exhibited and promoted, craftily and subtly therein alleging, articulating, and objecting, that on the said twentieth day of May, now last past, the said Samuel B. Davis, then commander of the said corvette, or vessel, the *Cassius*, did, forcibly, violently, and tortiously, take on the high seas, a certain schooner, or vessel, belonging to the said James Yard, called the *William Lindsey*, and brought her into Port de Paix (in the dominion of the French Republic), where she still remains; and also alleging and articulating that the said corvette, or vessel called the *Cassius*, was originally equipped and fitted for war, in the port of Philadelphia, in the United States, and that the said Samuel B. Davis was at the time of the said capture, and now is, a citizen of the United States: Without this, however, and the said James Yard, not in any manner alleging, or articulating, that the said capture was made within the territory, rivers, or bays, of the United States, or within a marine league of the coast thereof, or that the said corvette or vessel, the *Cassius*, was so fitted or equipped for war in the United States by the said French Republic, her agent, or agents, with their knowledge, or by the means, or procurement, or by the said Samuel B. Davis, or that at the time of her being so equipped, or fitted for war, in the United States (if ever there she was so in any manner fitted or equipped), she was the property of the said French Republic, or that the said Samuel B. Davis was in any manner in the said equipment, or fitting for war, concerned; and without this, also, and the said James Yard, not in any manner alleging that the said Samuel B. Davis was retained, or engaged, in the service of the French Republic, within the territory or jurisdiction of the United States: And that the said James Yard, him, the said Samuel B. Davis, and the said corvette, or vessel of war, called the *Cassius*, by force of the process aforesaid, out of the said District Court, had and obtained, as aforesaid,

still wrongfully detains, and the said Samuel B. Davis, and the French Republic, owner of the said corvette, or vessel of war, thereupon in the said District Court to answer, and in the premises, cause to be condemned, with all his power, endeavors, and daily contrives, in contempt of the government of the United States, against the laws of nations, and the treaties subsisting between the United States and the French Republic, and against the laws and customs of the United States, to the manifest violation of the law of nations and treaties, and to the manifest disturbance of the peace and harmony happily subsisting between the United States and the French Republic: Wherefore the said Samuel B. Davis, the aid of the said Supreme Court most respectfully requesting, has prayed remedy by a writ of prohibition, to be issued out of the said Supreme Court, to you to be directed, do prohibit you from holding the plea aforesaid, the premises aforesaid any wise concerning, further before you: — You, therefore, are hereby prohibited, that you no further hold the plea aforesaid, the premises aforesaid in any wise touching, before you, nor anything in the said District Court attempt, nor procure to be done, which may be in any wise to the prejudice of the said Samuel B. Davis, or the said corvette, or vessel of war, called the *Cassius*; or in contempt of the laws of the United States: And also, that from all proceedings thereon you do, without delay, release the said Samuel B. Davis, and the said corvette, or vessel of war, called the *Cassius*, at your peril.

Witness, the honorable John Rutledge, Esquire, Chief Justice of the said Supreme Court, at Philadelphia, this twenty-fourth day of August, in the year of our Lord one thousand seven hundred and ninety-five, and of the independence of the United States, the twentieth.

I. Wagner, D. C. Sup. Ct., U. S.[1]

[1] On release of the vessel pursuant to the writ of prohibition, a new libel was immediately filed in the Circuit Court by one of the former plaintiffs, on the ground of illegal equipment of the vessel the year before. — *Ketland* v. *The Cassius*, 2 Dall. 365.

At the October term, 1796, the question arose, whether the Circuit Court could take original cognizance of information for forfeiture under the Act of 1794; and the court dismissed the proceedings, on the ground that such proceedings must be instituted in the District Court. *Ketland* v. *The Cassius*, 2 Dall. 365. No further action was taken in the courts; and it will thus be seen that the question of international law was left undecided. The French minister, M. Adet, had dismantled the ship and had formally abandoned her to the government of the United States. The practical result was that a foreign ship of war was libelled and detained by the courts of the United States, and the Federal Executive seemed unable to prevent it.

In the *United States* v. *Guinet*, *ante*, the accused was tried and condemned to fine and imprisonment for aiding in fitting out the *Cassius* in contravention of the Act of 1794. — Ed.

THE "SANTISSIMA TRINIDAD."

SUPREME COURT OF THE UNITED STATES, 1822.

(7 *Wheaton*, 283.)

This was a libel filed by the consul of Spain, in the district court of Virginia, in April, 1817, against eighty-nine bales of cochineal, two bales of jalap, and one box of vanilla, originally constituting part of the cargoes of the Spanish ships *Santissima Trinidad* and *St. Ander*, and alleged to be unlawfully and piratically taken out of those vessels on the high seas by a squadron consisting of two armed vessels called the *Independencia del Sud* and the *Altravida*, and manned and commanded by persons assuming themselves to be citizens of the United Provinces of the Rio de la Plata. The libel was filed, in behalf of the original Spanish owners, by Don Pablo Chacon, consul of his Catholic Majesty for the port of Norfolk; and as amended, it insisted upon restitution, principally for three reasons:

(1) That the commanders of the capturing vessels, the *Independencia* and the *Altravida*, were native citizens of the United States, and were prohibited by our treaty with Spain of 1795, from taking commissions to cruise against that power. (2) That the said capturing vessels were owned in the United States, and were originally equipped, fitted out, armed and manned in the United States, contrary to law. (3) That their force and armament had been illegally augmented within the United States.

The district court, upon the hearing of the cause, decreed restitution to the original Spanish owners. That sentence was affirmed in the circuit court, and from the decree of the latter the cause was brought by appeal to this court.[1]

Judgment,—STORY, J.:—

"Upon the argument at the bar several questions have arisen, which have been deliberately considered by the court; and its judgment will now be pronounced. The first in the order, in which we think it most convenient to consider the cause, is, whether the *Independencia* is in point of fact a public ship, belonging to the government of Buenos Ayres. The history of this vessel, so far as is necessary for

[1] This statement of the case is substituted for that of the report and parts of the judgment are omitted. — ED.

the disposal of this point, is briefly this: She was originally built and equipped at Baltimore as a privateer during the late war with Great Britain, and was then rigged as a schooner, and called the *Mammoth*, and cruised against the enemy. After the peace she was rigged as a brig, and sold by her original owners. In January, 1816, she was loaded with a cargo of munitions of war, by her new owners, who are inhabitants of Baltimore, and being armed with twelve guns, constituting a part of her original armament, she was despatched from that port, under the command of the claimant, on a voyage, ostensibly to the Northwest Coast, but in reality to Buenos Ayres. By the written instructions given to the supercargo on this voyage, he was authorized to sell the vessel to the government of Buenos Ayres, if he could obtain a suitable price. She duly arrived at Buenos Ayres, having exercised no act of hostility, but sailed under the protection of the American flag, during the voyage. At Buenos Ayres the vessel was sold to Captain Chaytor and two other persons; and soon afterwards she assumed the flag and character of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres; and Captain Chaytor made known these facts to the crew, and asserted that he had become a citizen of Buenos Ayres; and had received a commission to command the vessel as a national ship; and invited the crew to enlist in the service; and the greater part of them accordingly enlisted. From this period, which was in May, 1816, the public functionaries of our own and other foreign governments at that port, considered the vessel as a public ship of war, and such was her avowed character and reputation. No bill of sale of the vessel to the government of Buenos Ayres is produced, and a question has been made principally from this defect in the evidence, whether her character as a public ship is established. It is not understood that any doubt is expressed as to the genuineness of Captain Chaytor's commission, nor as to the competency of the other proofs in the cause introduced, to corroborate it. We are of opinion that they do. In general the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character. A bill of sale is not necessary to be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign

courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns. The commission in the present case is not expressed in the most unequivocal terms; but its fair purport and interpretation must be deemed to apply to a public ship of the government. If we add to this the corroborative testimony of our own and the British consul at Buenos Ayres, as well as that of private citizens, to the notoriety of her claim of a public character; and her admission into our own ports as a public ship, with the immunities and privileges belonging to such a ship, with the express approbation of our own government, it does not seem too much to assert, whatever may be the private suspicion of a lurking American interest, that she must be judicially held to be a public ship of the country whose commission she bears. * * *

"The next question growing out of this record, is whether the property in controversy was captured in violation of our neutrality, so that restitution ought, by the law of nations, to be decreed to the libellants. Two grounds are relied upon to justify restitution: *First*, that the *Independencia* and *Altravida* were originally equipped, armed, and manned as vessels of war in our ports. *Secondly*, that there was an illegal augmentation of the force of the *Independencia* within our ports. Are these grounds, or either of them, sustained by the evidence? * * *

"The question as to the original illegal armament and outfit of the *Independencia* may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws on our national neutrality. If captured by a Spanish ship of war during the voyage she would have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bona fide* sale (and there is nothing in the evidence before us to contradict it), there is no pretence to say, that the original outfit on the voyage

was illegal, or that a capture made after the sale was, for that cause alone, invalid.

"The most material consideration is as to the augmentation of her force in the United States, at a subsequent period. * * *

"The Court is, therefore, driven to the conclusion, that there was an illegal augmentation of the force of the *Independencia* in our ports by a substantial increase of her crew; and this renders it wholly unnecessary to enter into an investigation of the question, whether there was not also an illegal increase of her armament. * * * This view of the question renders it unnecessary to consider another which has been discussed at the bar respecting what is denominated the right of expatriation. * * *

"And here we are met by an argument on behalf of the claimant, that the augmentation of the force of the *Independencia* within our ports, is not an infraction of the law of nations, or a violation of our neutrality; and that so far as it stands prohibited by our municipal laws the penalties are personal, and do not reach the case of restitution of captures made in the cruise, during which such augmentation has taken place. It has never been held by this court that an augmentation of force or illegal outfit affected any captures made after the original cruise was terminated. By analogy to other cases of violations of public law the offence may well be deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the same cruise, the doctrine of this court has long established that such illegal augmentation is a violation of the law of nations, as well as of our own municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct. It does not lie in the mouth of wrongdoers to set up a title derived from a violation of our neutrality.

"The cases in which this doctrine has been recognized and applied, have been cited at the bar, and are so numerous and so uniform, that it would be a waste of time to discuss them, or to examine the reasoning by which they are supported. More especially as no inclination exists on the part of the court to question the soundness of these decisions. If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the

captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign asserted in his own courts or the courts of the power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required before cognizance of the wrong could be taken by our courts. But the practice from the beginning in this class of causes, a period of nearly 30 years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy. * * *

"Upon the whole, it is the opinion of the court that the decree of the circuit court be affirmed, with costs." [1]

[1] In the case of *La Amistad de Rues*, 1820, 5 Wheat. 385, it was held that a civil court of a neutral country cannot adjudicate upon the validity of a capture *jure belli*, as between the captor and the prize. Its only function is to vindicate the offended sovereignty of its own country, when the capture was made in violation of its neutrality.

In the case of *The Nereyda*, 8 Wheaton, 108 (1823), a Spanish ship of war was captured by the privateer *Irresistible*, which was fitted out, owned and commanded by American citizens, cruising under a commission from Artigas, as chief of the Oriental Republic of Rio de la Plata. The prize was taken to Margarita, an island of Venezuela, and there condemned as prize, Venezuela being an ally of the Oriental Republic. She was there commissioned as a Venezuelan privateer, and came to Baltimore. Here she was libelled on behalf of the King of Spain on the ground that the *Irresistible* had been illegally fitted out in an American port. A claim was set up by one Francesche, who alleged that he had bought her at the prize sale. The Supreme Court (Story, J., giving the opinion) held that this purchase was not proved, and that she was still in the hands and ownership of the owners of the *Irresistible;* that their title was not improved by the condemnation, if valid otherwise; and restored her to the King of Spain. Dana's Wheaton, 555, note.

Other early cases in the United States courts on this question are: *The Betsey*, Bee, 67; *The Brothers*, Bee, 76; *The Nancy*, Bee, 73; *The Sloop Betsey*, 1794, 3 Dallas, 6; *The Magdalena*, 1796 (*Talbot* v. *Jansen*, 3 Dallas, 133); *The Alfred*, 1796, 3 Dallas, 307; *The Phœbe Ann*, 1796, 3 Dallas, 319; *The Alerta*, 1815, 9 Cranch, 359; *The Invincible*, 1816, 1 Wheaton, 238; *The Estrella*, 1819, 4 Wheaton, 298; *La Conception*, 1821, 6 Wheaton, 235; *Bello Corrunes*, 1821, 6 Wheaton, 152; *Gran Para*, 1822, 7 Wheaton, 471; *Arrogante Barcelones*, 1822, 7 Wheaton, 496; *The Fanny*, 1824, 9 Wheaton, 659.

For an admirable digest of these cases, the doctrines they establish and for principal cases involving a breach of our neutrality acts, as well as Great Britain's shortcomings in the civil war, see Dana's Wheaton, note 215, pp. 535–581. — ED.

UNITED STATES v. QUINCY.

SUPREME COURT OF THE UNITED STATES, 1832.

(6 *Peters*, 445.)

Mr. Justice THOMPSON delivered the opinion of the court:[1]

"This case comes up from the Circuit Court of the United States for the Maryland district, on a division of opinion of the judges, upon certain instructions prayed for to the jury.

"The indictment upon which the defendant was put upon his trial, contains a number of counts, to which the testimony did not apply, and which are not now drawn in question. The twelfth and thirteenth are the only counts to which the evidence applied; and the offence charged in each of these is substantially the same; to wit, that the said John D. Quincy, on the 31st day of December, 1828, at the district of Maryland, etc., with force and arms, was knowingly concerned in the fitting out of a certain vessel called the *Bolivar*, otherwise called *Las Damas Argentinas*, with intent that such vessel should be employed in the service of a foreign people, that is to say, in the service of the United Provinces of Rio de la Plata, to commit hostilities against the subjects of a foreign prince; that is to say, against the subjects of his imperial majesty, the constitutional emperor and perpetual defender of Brazil, with whom the United States then were, and still are at peace, against the form of the act of Congress in such case made and provided.

"The act of Congress under which the indictment was found, 6th Vol., Laws U. S., 321, sect. 3, declares, 'that if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people with whom the United States are at peace, etc., every person so offending, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years, etc.'

"The testimony being closed, several prayers, both on the part of

[1] Statement of the case omitted. — ED.

the United States and of the defendant, were presented to the court for their opinion and direction to the jury; and upon which the opinions of the judges were opposed, and which will now be noticed in the order in which they were made.

"On the part of the defendant the court was requested to charge the jury, that if they believe that when the *Bolivar* left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, she was not armed, or at all prepared for war, or in a condition to commit hostilities, the verdict must be for the defendant.

"The prayer on the part of the United States upon this part of the case, was, in substance, that if the jury find from the evidence that the defendant was, within the district of Maryland, knowingly concerned in the fitting out the privateer *Bolivar*, with intent that she should be employed in the manner alleged in the indictment, then the defendant was guilty of the offence charged against him, although the jury should find that the equipments of the said privateer were not complete within the United States, and that the cruise did not actually commence until men were recruited, and further equipments were made at the island of St. Thomas in the West Indies.

"The instruction which ought to be given to the jury under these prayers involves the construction of the act of Congress, touching the extent to which the preparation of the vessel for cruising or committing hostilities must be carried before she leaves the limits of the United States, in order to bring the case within the act.

"On the part of the defendant it is contended, that the vessel must be fitted out *and* armed, if not complete, so far at least as to be prepared for war, or in a condition to commit hostilities.

"We do not think this is the true construction of the act. It has been argued that, although the offence created by the act is a misdemeanor, and there cannot, legally speaking, be principal and accessory, yet the act evidently contemplates two distinct classes of offenders. The principal actors, who are directly engaged in preparing the vessel, and another class, who, though not the chief actors, are in some way concerned in the preparation.

"The act, in this respect, may not be drawn with very great perspicuity. But should the view taken of it by the defendant's counsel be deemed correct (which, however, we do not admit), it is not perceived how it can affect the present case. For the indictment, according to this construction, places the defendant in the secondary class of offenders. He is only charged with being knowingly concerned in the fitting out the vessel, with intent that she should be employed, etc.

"To bring him within the words of the act, it is not necessary to charge him with being concerned in fitting out *and* arming. The words of the act are, fitting out *or* arming. Either will constitute the offence. But it is said such fitting out must be of a vessel armed and in a condition to commit hostilities, otherwise the minor actor may be guilty when the greater would not. For, as to the latter, there must be a fitting out *and* arming in order to bring him within the law. If this construction of the act be well founded, the indictment ought to charge, that the defendant was concerned in fitting out the *Bolivar, being a vessel fitted out and armed, etc.* But this, we apprehend, is not required. It would be going beyond the plain meaning of the words used in defining the offence. It is sufficient if the indictment charges the offence in the words of the act; and it cannot be necessary to prove what is not charged. It is true, that, with respect to those who have been denominated at the bar the chief actors, the law would seem to make it necessary that they should be charged with fitting out *and* arming. These words may require that both should concur; and the vessel be put in a condition to commit hostilities, in order to bring her within the law. But an *attempt* to fit out *and* arm is made an offence. This is certainly doing something short of a complete fitting out and arming. To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress towards it. Any effort or endeavor to effect it will satisfy the terms of the law.

"This varied phraseology in the law was probably employed with a view to embrace all persons of every description who might be engaged, directly or indirectly in preparing vessels with intent that they should be employed in committing hostilities against any powers with whom the United States were at peace. Different degrees of criminality will necessarily attach to persons thus engaged. Hence the great latitude given to the courts in affixing the punishment, viz., a fine not more than ten thousand dollars and imprisonment not more than three years.

"We are, accordingly, of opinion, that it is not necessary that the jury should believe or find that the *Bolivar*, when she left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, was armed, or in a condition to commit hostilities, in order to find the defendant guilty of the offence charged in the indictment.

"The first instruction, therefore, prayed on the part of the defendant, must be denied, and that on the part of the United States given.

"The second and third instructions asked on the part of the defendant, were:

"That if the jury believe that, when the *Bolivar* was fitted and equipped at Baltimore, the owner and equipper intended to go to the West Indies in search of funds, with which to arm and equip the said vessel and had *no present intention* of using or employing the said vessel as a privateer, but intended, when he equipped her, to go to the West Indies, to endeavor to raise funds to prepare her for a cruise; then the defendant is not guilty.

"Or if the jury believe that, when the *Bolivar* was equipped at Baltimore, and when she left the United States, the equipper *had no fixed intention to employ* her as a privateer, but had a wish so to employ her, the fulfilment of which wish depended on his ability to obtain funds in the West Indies, for the purpose of arming and preparing her for war; then the defendant is not guilty.

"We think these instructions ought to be given. The offence consists principally in the intention with which the preparations were made. These preparations, according to the very terms of the act, must be made within the limits of the United States; and it is equally necessary that the intention with respect to the employment of the vessel should be formed before she leaves the United States. And this must be a fixed intention; not conditional or contingent, depending on some future arrangements. This intention is a question belonging exclusively to the jury to decide. It is the material point on which the legality or criminality of the act must turn; and decides whether the adventure is of a commercial or warlike character.

"The law does not prohibit armed vessels belonging to citizens of the United States from sailing out of our ports; it only requires the owners to give security (as was done in the present case) that such vessels shall not be employed by them to commit hostilities against foreign powers at peace with the United States. The collectors are not authorized to detain vessels, although manifestly built for warlike purposes, and about to depart from the United States, unless circumstances shall render it probable that such vessels are intended to be employed by the owners to commit hostilities against some foreign power, at peace with the United States.

"All the latitude, therefore, necessary for commercial purposes, is given to our citizens; and they are restrained only from such acts as are calculated to involve the country in war.

"The second and third instructions, asked on the part of the United States, ought also to be given. For, if the jury shall find (as the instructions assume) that, the defendant was knowingly

concerned in fitting out the *Bolivar* within the United States, with the intent that she should be employed as set forth in the indictment, that intention being defeated by what might afterwards take place in the West Indies, would not purge the offence, which was previously consummated. It is not necessary that the design or intention should be carried into execution in order to constitute the offence.

"The last instruction or opinion asked on the part of the defendant, was:

"That, according to the evidence in the cause, the United Provinces of Rio de la Plata is, and was, at the time of the offence alleged in the indictment, a government acknowledged by the United States, and thus was a *state*, and not a *people*, within the meaning of the act of Congress, under which the defendant is indicted; the word *people* in that act being intended to describe communities under an existing government, not recognized by the United States; and that the indictment cannot be supposed on this evidence.

"The indictment charges that the defendant was concerned in fitting out the *Bolivar*, with intent that she should be employed in the service of a foreign *people;* that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence, that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation by the executive department of the government of the United States, before the year 1827. And, therefore, it is argued that the word *people* is not properly applicable to that nation or power.

"The objection is one purely technical, and we think not well-founded. The word *people*, as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power. The words are, 'in the service of any foreign prince or state; or of any colony, district or *people*.' The application of the word *people* is rendered sufficiently certain by what follows under the videlicet, 'that is to say, the United Provinces of Rio de la Plata.' This particularizes that which by the word *people* is left too general. The descriptions are no way repugnant or inconsistent with each other, and may well stand together. That which comes under the videlicet, only serves to explain what is doubtful and obscure in the word *people*.

"This instruction must therefore be denied, and the one asked on the part of the United States, viz., that the indictment is sufficient in law, must be given.

"These answers must accordingly be certified to the circuit court."

UNITED STATES v. THE "METEOR."

UNITED STATES CIRCUIT COURT FOR SO. NEW YORK, 1866.

(3 *American Law Review*, 173.)

The *Meteor* was built in the United States in 1865, during the war then pending between Chile and Spain, and sold to the Chilean government, without armament, and then, it was alleged, commissioned when in the United States, as a Chilean privateer. She was libelled in New York and seized January 23, 1866. Upon a hearing before Judge Betts, that learned judge held that there must be a decree condemning and forfeiting the property under seizure, in accordance with the prayer of the libel.[1]

Mr. Justice NELSON: —

"This is an appeal in admiralty from a decree of condemnation in a libel of information for the violation of the neutrality laws of the United States. We have examined the pleadings and proofs in the case, and have been unable to concur in the judgment of the court below, but from the pressure of other business have not found time to write out at large the grounds and reasons for the opinion arrived at. We must, therefore, for the present, be content in the statement of our conclusions in the matter.

"1. Although negotiations were commenced and carried on between the owners of the *Meteor* and agents of the Government of Chile, for the sale of her to the latter, with the knowledge that she would be employed against the Government of Spain, with which Chile was at war, yet these negotiations failed and came to an end from the inability of the agents to raise the amount of the purchase-money demanded; and if the sale of the vessel, in its then condition and equipment, to the Chilean Government would have been a violation of our neutrality laws, of which it is unnecessary to express any opinion, the termination of the negotiation put an end to this ground of complaint.

"2. The furnishing of the vessel with coal and provisions for a voyage to Panama, or some other port of South America, and the purpose of the owners to send her thither, in our judgment, was not in pursuance of an agreement or understanding with the agents of the Chilean Government, but for the purpose and design of finding a market for her, and that the owners were free to sell her on her

[1] The above statement of the case is taken from 3 Wharton's Digest, 561. The case is briefly reported in the American Law Review, 401. — ED.

arrival there to the Government of Chile or of Spain, or of any other Government or person with whom they might be able to negotiate a sale.

"3. The witnesses chiefly relied on to implicate the owners in the negotiations with the agents of the Chilean Government, with a view and intent of fitting out and equipping the vessel to be employed in the war with Spain, are persons who had volunteered to negotiate on behalf of the agents with the owners in expectation of large commissions in the event of a sale, or persons in the expectation of employment in some situation in the command of the vessel, and very clearly manifest their disappointment and chagrin at the failure of the negotiations, and whose testimony is to be examined with considerable distrust and suspicion. We are not satisfied that a case is made out, upon the proofs, of a violation of the neutrality laws of the United States, and must, therefore, reverse the decree below, and enter a decree dismissing the libel."[1]

[1] An appeal was taken by the government from the decision of the Circuit Court to the Supreme Court of the United States, but was not prosecuted to a hearing, being dismissed by consent, November 9, 1868.

For a criticism on Judge Betts' ruling, see an article in the "North American Review" for October, 1866 (Vol. 103, p. 188).

Dana says of the Practice of the United States (note to Wheaton, p. 562): "As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied has not been the extent and character of the preparations, but the intent with which the particular acts are done. If any person does any act, or attempts to do any act, toward such preparation, with the intent that the vessel shall be employed in hostile operations, he is guilty, without reference to the completion of the preparations, or to the extent to which they have gone, and although his attempt may have resulted in no definite progress towards the completion of the preparations. The procuring of materials to be used, knowingly and with the intent, etc., is an offence. * * *

"On the point of the intent, more nicety and discrimination are necessary. If the person charged has himself the control of the vessel, to put her into foreign belligerent service, the question of the intent to employ her is simple. If he has not, he is still chargeable with doing acts, or being knowingly concerned in the doing of acts, of or towards the preparation, with the intent that the vessel shall be so employed though others may control her during the preparations. But the intent must be that she shall be so employed; and the intent must be a fixed and present intent, and not a wish or desire merely that she may be. If there is a contingency, it must, to exculpate the party, be one which forms a condition precedent to the intent, and not merely a condition precedent to the employment, or a condition subsequent which may defeat the intent. Thus, if the owner of a vessel, not completely ready for hostile operations, with instructions to her commander to complete her preparation and obtain letters of marque in the port of destination, and, in case of failure in obtaining the commission and equipment, to take a cargo and return, he would doubtless be guilty; for he has entered on the execution of his purpose, and those are only the ordinary contingencies to all employments, by which they may be defeated. But the purpose to which he shall put his vessel after her arrival may

THE "ALABAMA" CLAIMS AND AWARD, 1872.

Treaty between the United States and Great Britain, Concluded May 8, 1871.

Article I. — Whereas differences have arisen between the Government of the United States and the Government of her Britannic Majesty, and still exist, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the "Alabama claims":

And whereas her Britannic Majesty has authorized her High Commissioners and Plenipotentiaries to express, in a friendly spirit, the

depend on circumstances so entirely contingent and fortuitous, as to relieve from the charge of a fixed intent at the time he sends her out.

"It will be seen at once, by these abstract definitions, that our rules do not interfere with *bona fide* commercial dealings in contraband of war. An American merchant may build and fully arm a vessel, and supply her with stores, and offer her for sale in our own market. If he does any acts, as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is guilty. He may, without violating our law, send out such a vessel, so equipped, under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandise, of blockade, and of a market in a belligerent port. In such case, the extent and character of the equipments is as immaterial as in the other class of cases. The intent is all. The act is open to great suspicions and abuse, and the line may often be scarcely traceable; yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandise, to be sent to the market of a belligerent, subject to the chances of capture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise, immediately or ultimately, against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent. In the former case, the ship is merchandise, under *bona fide* neutral flag and papers, with a port of destination, subject to search and capture as contraband merchandise by the other belligerent, or to the risks of blockade, and with no right to resist search and seizure, and liable to be treated as a pirate by any nation, if she does any act of hostility to the property of a belligerent, as much as if she did it to that of a neutral. Such a trade in contraband, a belligerent may cut off by cruising the seas and by blockading his enemy's ports. But, to protect himself against vessels sailing out of a neutral port to commit hostilities, it would be necessary for him to hover off the ports of the neutral; and, to do that effectually, he must maintain a kind of blockade of the neutral coast; which, as neutrals will not permit, they ought not to give occasion for."

In the Terceira Affair, 1827, it appeared that an expedition left English ports to attack the government of Portugal. A British squadron was despatched in pursuit, and finding the vessels of the expedition in Portuguese waters, the English captain kept a close watch upon them and finally ordered them out of the neighborhood. For further details, see 3 Phillimore, Int. Law, 287. — Ed.

regret felt by her Majesty's Government for the escape, under whatever circumstances, of the *Alabama* and other vessels from British ports, and for the depredations committed by those vessels:

Now, in order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims which are not admitted by her Britannic Majesty's Government, the high contracting parties agree that all the said claims growing out of acts committed by the aforesaid vessels and generically known as the "Alabama claims," shall be referred to a tribunal of arbitration composed of five arbitrators, to be appointed in the following manner, that is to say: One shall be named by the President of the United States; one shall be named by her Britannic Majesty; his Majesty the King of Italy shall be requested to name one; the President of the Swiss Confederation shall be requested to name one; and his Majesty the Emperor of Brazil shall be requested to name one. * * *

Article II. — The arbitrators shall meet at Geneva, in Switzerland, at the earliest convenient day after they shall have been named, and shall proceed impartially and carefully to examine and decide all questions that shall be laid before them on the part of the Governments of the United States and her Britannic Majesty respectively. All questions considered by the tribunal, including the final award, shall be decided by a majority of all the arbitrators. * * *

Article VI. — In deciding the matters submitted to the arbitrators they shall be governed by the following three rules, which are agreed upon by the high contracting parties, as rules to be taken as applicable to the case, and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case.

"RULES.

"A neutral government is bound —

"First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly. To exercise due diligence in its own ports and waters,

and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligation and duties.

"Her Britannic Majesty has commanded her high commissioners and plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of the principles of international law which were in force at the time when the claims mentioned in Article I. arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries, arising out of those claims, the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

"And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them."

DECISION AND AWARD.

"The tribunal having since fully taken into their consideration the treaty and also the cases, counter-cases, documents, evidence, and arguments, and likewise all other communications made to them by the two parties during the progress of their sittings, and having impartially and carefully examined the same,

"Has arrived at the decision embodied in the present award:

"Whereas, having regard to the sixth and seventh articles of the said treaty, the arbitrators are bound under the terms of the said sixth article, 'in deciding the matters submitted to them, to be governed by the three rules therein specified and by such principles of international law, not inconsistent therewith as the arbitrators shall determine to have been applicable to the case;'

"And whereas the 'due diligence,' referred to in the first and third of the said rules, ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part;

"And whereas the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her Britannic Majesty's Government of all possible solicitude for the observance of the rights and duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861.

"And whereas the effects of a violation of neutrality, committed

by means of the construction, equipment, and armament of a vessel is not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offense is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence.

"And whereas the privilege of extra-territoriality, accorded to vessels of war, has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and, therefore, can never be appealed to for the protection of acts done in violation of neutrality;

"And whereas the absence of a previous notice cannot be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation;

And whereas, in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances, of time, of persons, or of place, which may combine to give them such character;

"And whereas, with respect to the vessel called the *Alabama*, it clearly results from all the facts relative to the construction of the ship, at first designated by the number '290,' in the port of Liverpool, and its equipment and armament in the vicinity of Terceira, through the agency of the vessels called the *Agrippina* and the *Bahama*, dispatched from Great Britain to that end, that the British Government failed to use due diligence in the performance of its neutral obligations, and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number '290,' to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

"And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred;

"And whereas, in despite of the violations of the neutrality of

Great Britain, committed by the '290,' this same vessel, later known as the Confederate cruiser *Alabama*, was on several occasions freely admitted into the ports of the colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found;

"And whereas the Government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed:

"Four of the arbitrators for the reasons above assigned, and the fifth, for reasons separately assigned by him, are of opinion that Great Britain has in this case failed, by omission, to fulfill the duties prescribed in the first and the third of the rules, established by the sixth article of the treaty of Washington.

"And whereas, with respect to the vessel called the *Florida*, it results from all the facts relative to the construction of the *Oreto* in the port of Liverpool, and to its issue therefrom, which facts failed to induce the authorities in Great Britain to resort to measures adequate to prevent the violation of the neutrality of that nation, notwithstanding the warnings and repeated representations of the agents of the United States; that Her Majesty's government has failed to use due diligence to fulfill the duties of neutrality;

"And whereas it likewise results from all the facts relative to the stay of the *Oreto* at Nassau, to her issue from that port, to her enlistment of men, to her supplies, and to her armament, with the cooperation of the British vessel *Prince Alfred*, at Green Cay, that there was negligence on the part of the British colonial authorities;

"And whereas, notwithstanding the violation of the neutrality of Great Britain, committed by the *Oreto*, this same vessel, later known as the Confederate cruiser *Florida*, was, nevertheless, on several occasions freely admitted into the ports of British colonies;

"And whereas the judicial acquittal of the *Oreto* at Nassau cannot relieve Great Britain from the responsibility incurred by her under the principles of international law; nor can the fact of the entry of the *Florida* into the Confederate port of Mobile, and of its stay there during four months, extinguish the responsibility previously to that time incurred by Great Britain;

"For these reasons the tribunal, by a majority of four voices to one, is of opinion, that Great Britain has in this case failed, by omission, to fulfill the duties prescribed in the first, in the second, and in the third, of the rules established by Article VI., of the Treaty of Washington.

"And whereas, with respect to the vessel called the *Shenandoah*, it results from all the facts relative to the departure from London of the merchant vessel, the *Sea King*, and to the transformation of that ship into a Confederate cruiser under the name of the *Shenandoah*, near the island of Madeira, that the Government of Her Britannic Majesty is not chargeable with any failure, down to that date, in the use of due diligence to fulfill the duties of neutrality;

"But whereas it results from all the facts connected with the stay of the *Shenandoah* at Melbourne, and especially with the augmentation which the British Government itself admits to have been clandestinely effected of her force, by the enlistment of men within that port, that there was negligence on the part of the authorities at that place;

"For these reasons the tribunal is unanimously of opinion, that Great Britain has not failed, by any act or omission, 'to fulfill any of the duties prescribed by the three rules of Article VI. in the Treaty of Washington, or by the principles of international law not inconsistent therewith,' in respect to the vessel called the *Shenandoah*, during the period of time anterior to her entry into the port of Melbourne;

"And, by a majority of three to two voices, the tribunal decides that Great Britain has failed, by omission, to fulfill the duties prescribed by the second and third of the rules aforesaid, in the case of this same vessel, from and after her entry into Hobson's Bay, and is, therefore, responsible for all acts committed by that vessel after her departure from Melbourne, on the 18th day of February, 1865.

"And so far as relates to the vessels called the *Tuscaloosa* (tender to the *Alabama*), the *Clarence*, the *Tacony*, and the *Archer*, (tenders to the *Florida*), the tribunal is unanimously of opinion, that such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively.

"And so far as relates to the vessel called *Retribution*, the tribunal, by a majority of three to two voices, is of opinion, that Great Britain has not failed, by any act or omission, to fulfill any of the duties prescribed by the three rules of Article VI., in the Treaty of Washington, or by the principles of international law not inconsistent therewith.

"And so far as relates to the vessels called the *Georgia*, the *Sumpter*, the *Nashville*, the *Tallahassee*, and the *Chickamauga*, respectively, the tribunal is unanimously of opinion, that Great Britain has not failed, by any act or omission, to fulfill any of the duties prescribed by the three rules of Article VI., in the Treaty of

Washington, or by the principles of international law not inconsistent therewith.

"And so far as relates to the vessels called the *Sallie*, the *Jefferson Davis*, the *Music*, the *Boston*, and the *V. H. Joy* respectively, the tribunal is unanimously of opinion that they ought to be excluded from consideration for want of evidence.

"And whereas, so far as relates to the particulars of the indemnity claimed by the United States, the costs of pursuit of the Confederate cruisers are not, in the judgment of the tribunal, properly distinguishable from the general expenses of the war carried on by the United States:

"The tribunal is, therefore, of opinion, by a majority of three to two voices, that there is no ground for awarding to the United States any sum by way of indemnity under this head.

"And, whereas, prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies:

"The tribunal is unanimously of opinion that there is no ground for awarding to the United States any sum by way of indemnity under this head.

"And, whereas, in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses, and all claims for 'gross freights,' so far as they exceed 'net freights';

"And, whereas, it is just and reasonable to allow interest at a reasonable rate;

"And, whereas, in accordance with the spirit and letter of the Treaty of Washington, it is preferable to adopt the form of adjudication of a sum in gross, rather than to refer the subject of compensation for further discussion and deliberation to a board of assessors, as provided by Article X., of the said treaty:

"The tribunal, making use of the authority conferred upon it by Article VII., of the said treaty, by a majority of four voices to one, awards to the United States a sum of $15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States, for the satisfaction of all the claims referred to the consideration of the tribunal, conformably to the provisions contained in Article VII., of the aforesaid treaty.

"And, in accordance with the terms of Article XI. of the said treaty, the tribunal declares that 'all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled.'

"Furthermore, it declares that 'each and every one of the said

claims, whether the same may or may not have been presented to the notice of, or made, preferred, or laid before the tribunal, shall henceforth be considered and treated as finally settled, barred, and inadmissible.'"

In testimony whereof this present decision and award has been made in duplicate, and signed by the arbitrators who have given their assent thereto, the whole being in exact conformity with the provisions of Article VII., of the said Treaty of Washington.

Made and concluded at the Hotel de Ville of Geneva, in Switzerland, the 14th day of the month of September, in the year of our Lord one thousand eight hundred and seventy-two.[1]

Charles Francis Adams,	Stampfli,
Frederick Sclopis,	Vicomte D'Itajuba.

[1] *The Three Rules of the Treaty of Washington* have been the subject of widespread interest and discussion. The question was immediately raised, whether they formed, at the time of the American civil war, or indeed since that time, a true expression of the accepted principles of International Law. The English Government, at the time of the arbitration, announced that it did not accept them "as a statement of principles of International Law which were in force at the time when the claims arose;" and the view generally held in England was that they were *ex post facto* rules.

On the other hand, continental jurists are inclined to regard these rules as a fair statement of modern International Law upon the subject to which they apply. See an article by Calvo in the Revue de Droit International, Vol. VI pp. 453–532.

See a careful study by C. F. Adams, The Treaty of Washington (Lee at Appomattox, 1902, pp. 31–255); Foster, Am. Dip. 357–400, 423–428; Taylor, Int. Law, §§ 614–616; 1 Moore, Int. Arb. 495–682, 4 id. 4057–4178. The literature on the subject is carefully and elaborately considered in Moore's masterly account. See also the elaborate monographs by Montague Bernard, Historical Account of the Neutrality of Great Britain during the American Civil War (1870); Caleb Cushing, The Treaty of Washington (1873). For the "Alabama" Claims Courts, see 5 Moore, Int. Arb. 4639–4685.

In considering this question, it should be remembered that, by the introduction of steam as the motive power of ships, and of iron and steel as the material of their construction, the conditions of maritime warfare have been very radically changed. What might have been a reasonable rule as applied in the time of sailing ships might now, in the age of swift ironclads, be intolerably oppressive. In the cases of the *Santissima Trinidad*, *U. S.* v. *Quincy*, and the *Meteor*, the courts were dealing with small sailing vessels, which had been converted into privateers, the possession of which by one or the other belligerent made very little difference in the general result of the struggle; whereas, the possession of an ironclad ship might very well turn the scale one way or the other, as indeed it did in the war between Chile and Peru, in 1880–1881. This great power of inflicting injury upon one of the belligerents, it is fair to say, ought not to be permitted to neutral citizens; and the neutral nation is alone in a position to restrain them.

In view of these facts it is believed that the doctrine set up by the United States Neutrality Act and by the Federal Courts, that the "intent" of the owner or shipbuilder is the criterion by which his guilt or innocence is to be judged, is wholly inadequate; it would not for a moment stand the test of the rule of "due diligence," as applied by the Geneva tribunal.

The English Foreign Enlistment Act of 1870 is perhaps the best and fairest expression of the modern rule anywhere to be found in public laws. — Ed.

Section 41. — Aid to Insurgents.

(*a*) *Loan of Money.*

DE WUTZ v. HENDRICKS.

Common Pleas, 1824.

(9 *Moore*, 586.)

This was an action of trover for certain papers, and which were described in the declaration to be a power of attorney, and sundry engravings.

At the trial, before Lord Chief Justice Best, at Guildhall, at the Sittings after the last Term, it appeared that the plaintiff had proposed to raise money by way of loan, to espouse the cause of the Greeks against the government of the Porte. That he stated publicly that he was authorized to do so, and, in consequence, applied to the defendant, a stockbroker, to negotiate the loan, who required certain securities to be left with him for that purpose; that the plaintiff accordingly lodged with him a power of attorney, which, he stated, was signed and executed abroad by the Exarch of Ravenna, authorizing him, the plaintiff, to raise money for the Greek cause; he also requested the defendant to procure certain scrip receipts to be engraved, which he accordingly did, and which were afterwards stamped at the stamp office, as such receipts. The defendant suspecting the accuracy of the plaintiff's statement or authority, the intended loan failed, and no money was raised by him. The plaintiff then claimed the power of attorney and engraved scrip receipts from the defendant, which he refused to deliver up, until the engraver's bill and other expenses had been paid. On their amount being tendered, the defendant claimed a commission for scrip on part of the loan, which the plaintiff also offered to pay, provided the defendant would transfer the scrip to him, on which he claimed such commission; but none was in fact ever raised, as the projected loan fell to the ground in the first instance. The plaintiff having again formally demanded the above documents from the defendant, who refused to deliver them up, he commenced the present action.

For the defendant, it was submitted, that the whole of the transaction was a fraud on the part of the plaintiff, as he had no authority to negotiate the loan in question. And his Lordship being of opinion,

that a resident in this country could not enter into an engagement to raise money by way of loan, to assist subjects of a foreign state, so as to enable them to prosecute a war against a government in alliance with our own, without the license of the Crown; the Jury accordingly found a verdict for the defendant.

Lord Chief Justice BEST.—"I am of opinion, that the whole of the transaction on which the plaintiff rested his claim to recover the articles in question from the defendant, was bottomed in fraud; the Jury so found at the trial; and I am perfectly satisfied with their verdict.

"I then thought that it was contrary to the law of nations, for persons residing in this country, to enter into engagements to raise money, by way of loan, for the purpose of supporting subjects of a foreign state in arms against a government in alliance with our own; and that no right of action could arise out of such a transaction; and I consequently suggested a nonsuit; but as it was not insisted on by the defendants' counsel, I allowed the cause to proceed. A case in circumstances precisely similar to the present, except that a different loan was proposed to be raised, was lately decided in the Court of Chancery in which the Lord Chancellor entertained the same opinion as myself, and in which he is stated to have said, that English Courts of Justice will not take notice of, or afford any assistance to persons who set about raising loans for subjects of the King of Spain, to enable them to prosecute a war against that sovereign; or, at all events that such loans could not be raised without the license of the Crown. I left the question to the Jury on the merits, and they found that the power of attorney was an abrogated fabrication. It appeared on the face of it to have been executed in Greece, it was drawn up in the modern Greek language, and was pretended to have been sent from that country. The plaintiff, however, adduced no evidence to show that it was a genuine instrument; but, on the contrary, it was proved to have been executed in London, but by whom did not appear. The other articles sought to be recovered, and described in the declaration as engravings, were scrip receipts, which could be of no value, as the whole of the transaction to which they were intended to be applied fell to the ground, as it was founded and bottomed in fraud. It was proved for the defendant, that he was employed by the plaintiff to negotiate the loan in question; that many articles had been written on the subject, and that placards had been stuck up in the city, stating, that the plaintiff was not authorized by the Greek government to raise any money, and that it was altogether a fraud.

"I told the Jury, that, with respect to the power of attorney, the

plaintiff could not be entitled to recover, unless he shewed that it was a genuine instrument, as it was so described in the declaration; and that to render it valid, he should have proved that it was executed in Greece; but there was no evidence whatever to shew that fact;—on the contrary, it was proved to have been concocted and executed in Mincing Lane. I also told the Jury, that if the plaintiff was attempting a fraud on the public by raising money under a false pretence, and that he caused the papers in question to be delivered to the defendant in furtherance of such attempt, he could not be entitled to recover them back in this action. The Jury, under these circumstances, were fully warranted in considering the transaction as fraudulent; and I am not only satisfied with their verdict, but am decidedly of opinion that there is no ground whatever to disturb it.

"The rest of the Court concurring, Rule refused."[1]

KENNETT v. CHAMBERS.

SUPREME COURT OF THE UNITED STATES, 1852.

(14 *Howard*, 38.)

Mr. Chief Justice TANEY delivered the opinion of the court:[2] —

This is an appeal from the decree of the District Court of the United States for the District of Texas.

The appellants filed a bill in that court against the appellee, to obtain the specific execution of an agreement which is set out in full in the bill; and which they allege was executed at the city of Cincinnati, in the State of Ohio, on or about the 16th of September, 1836. Some of the complainants claim as original parties to the contract, and the others as assignees of original parties, who have sold and assigned to them their interest.

The contract, after stating that it was entered into on the day and year above mentioned, between General T. Jefferson Chambers, of the Texan army, of the first part, and Morgan Neville and six others, who are named in the agreement, of the city of Cincinnati, of the second part, proceeds to recite the motives and inducements of the parties in the following words: —

[1] For the case of *Thompson* v. *Powles*, 1828, 2 Sim. 194, *ante*, 37. — ED.

[2] The statement of the case is omitted. — ED.

"That the said party of the second part, being desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming, and equipping volunteers for Texas, and who is in want of means therefor; and, being extremely desirous to advance the cause of freedom and the independence of Texas, have agreed to purchase of the said T. Jefferson Chambers, of his private estate, the lands hereinafter described."

And after this recital follows the agreement of Chambers, to sell and convey to them the land described in the agreement, situated in Texas, for the sum of twelve thousand five hundred dollars, which he acknowledged that he had received in their notes, payable in equal instalments of four, six, and twelve months, and he covenanted that he had a good title to this land, and would convey it with general warranty. There are other stipulations, on the part of Chambers, to secure the title to the parties, which it is unnecessary to state, as they are not material to the questions before the court.

After setting out the contract at large, the bill avers, that the notes given, as aforesaid, were all paid; and sets forth the manner in which the complainants, who were not parties to the original contract, had acquired their interest as assignees; and charges that, notwithstanding the full payment of the money, Chambers, under different pretexts, refuses to convey the land, according to the terms of his agreement.

It further states, that they are informed and believe that he received full compensation, in money, scrip, land, or other valuable property, for the supplies furnished by him, and in arming and equipping the Texan army referred to in the said contract, and which it was in part the object of the said parties of the second part to assist him to do, by the said advances made by them, as before stated, and which said advances did enable the said Chambers so to do.

To this bill the respondent (Chambers) demurred, and the principal question which arises on the demurrer is, whether the contract was a legal and valid one, and such as can be enforced by either party in a court of the United States. It appears on the face of it, and by the averments of the appellants in their bill, that it was made in Cincinnati, with a general in the Texan army, who was then engaged in raising, arming, and equipping volunteers for Texas, to carry on hostilities with Mexico; and that one of the inducements of the appellants, in entering into this contract and advancing the money, was to assist him in accomplishing these objects.

The District Court decided that the contract was illegal and void,

and sustained the demurrer and dismissed the bill; and we think that the decision was right.

The validity of this contract depends upon the relation in which this country then stood to Mexico and Texas; and the duties which these relations imposed upon the government and citizens of the United States.

Texas had declared itself independent a few months previous to this agreement. But it had not been acknowledged by the United States; and the constituted authorities charged with our foreign relations regarded the treaties we had made with Mexico as still in full force, and obligatory upon both nations. By the treaty of limits, Texas had been admitted by our government to be a part of the Mexican territory; and by the first article of the treaty of amity, commerce, and navigation, it was declared, "that there should be a firm, inviolable, and universal peace, and a true and sincere friendship between the United States of America and the United Mexican States, in all the extent of their possessions and territories, and between their people and citizens respectively, without distinction of persons or place." These treaties, while they remained in force, were, by the Constitution of the United States, the supreme law, and binding not only upon the government, but upon every citizen. No contract could lawfully be made in violation of their provisions.

Undoubtedly, when Texas had achieved her independence, no previous treaty could bind this country to regard it as a part of the Mexican territory. But it belonged to the government, and not to individual citizens, to decide when that event had taken place. And that decision, according to the laws of nations, depended upon the question whether she had or had not a civil government in successful operation, capable of performing the duties and fulfilling the obligations of an independent power. It depended upon the state of the fact, and not upon the right which was in contest between the parties. And the President, in his message to the Senate of Dec. 22, 1836, in relation to the conflict between Mexico and Texas, which was still pending, says: "All questions relative to the government of foreign nations, whether of the old or the new world, have been treated by the United States as questions of fact only, and our predecessors have cautiously abstained from deciding upon them until the clearest evidence was in their possession, to enable them not only to decide correctly, but to shield their decision from every unworthy imputation." Senate Journal of 1836, 37, p. 54.

Acting upon these principles, the independence of Texas was not acknowledged by the government of the United States until the beginning of March, 1837. Up to that time, it was regarded as a part

of the territory of Mexico. The treaty which admitted it to be so, was held to be still in force and binding on both parties, and every effort made by the government to fulfil its neutral obligations, and prevent our citizens from taking part in the conflict. This is evident, from an official communication from the President to the Governor of Tennessee, in reply to an inquiry in relation to a requisition for militia, made by General Gaines. The despatch is dated in August, 1836; and the President uses the following language: "The obligations of our treaty with Mexico, as well as the general principles which govern our intercourse with foreign powers, require us to maintain a strict neutrality in the contest which now agitates a part of that republic. So long as Mexico fulfils her duties to us, as they are defined by the treaty, and violates none of the rights which are secured by it to our citizens, any act on the part of the government of the United States, which would tend to foster a spirit of resistance to her government and laws, whatever may be their character or form, when administered within her own limits and jurisdiction, would be unauthorized and highly improper. Ex. Doc. 1836, 1837, Vol. 1, Doc. 2, p. 58.

And on the very day on which the agreement of which we are speaking was made (Sept. 16, 1836), Mr. Forsyth, the Secretary of State, in a note to the Mexican minister, assured him that the government had taken measures to secure the execution of the laws for preserving the neutrality of the United States, and that the public officers were vigilant in the discharge of that duty. Ex. Doc. Vol. 1, Doc. 2, pp. 63–64.

And still later, the President, in his message to the Senate of Dec. 22, 1836, before referred to, says: "The acknowledgment of a new State as independent, and entitled to a place in the family of nations, is at all times an act of great delicacy and responsibility; but more especially so when such a State has forcibly separated itself from another, of which it formed an integral part, and which still claims dominion over it." And, after speaking of the policy which our government had always adopted on such occasions, and the duty of maintaining the established character of the United States for fair and impartial dealing, he proceeds to express his opinion against the acknowledgment of the independence of Texas, at that time, in the following words: —

"It is true, with regard to Texas, the civil authority of Mexico has been expelled, its invading army defeated, the chief of the republic himself captured, and all present power to control the newly organized government of Texas annihilated within its confines. But, on the other hand, there is, in appearance at least, an immense dis-

parity of physical force on the side of Mexico. The Mexican republic, under another executive, is rallying its forces under a new leader, and menacing a fresh invasion to recover its lost dominion. Upon the issue of this threatened invasion, the independence of Texas may be considered as suspended; and, were there nothing peculiar in the relative situation of the United States and Texas, our acknowledgment of its independence at such a crisis would scarcely be regarded as consistent with that prudent reserve with which we have heretofore held ourselves bound to treat all similar questions."

The whole object of this message appears to have been to impress upon Congress the impropriety of acknowledging the independence of Texas at that time; and the more especially as the American character of her population, and her known desire to become a State of this Union, might, if prematurely acknowledged, bring suspicion upon the motives by which we were governed.

We have given these extracts from the public documents not only to show that, in the judgment of our government, Texas had not established its independence when this contract was made, but to show also how anxiously the constituted authorities were endeavoring to maintain untarnished the honor of the country, and to place it above the suspicion of taking any part in the conflict.

This being the attitude in which the government stood, and this its open and avowed policy, upon what grounds can the parties to such a contract as this, come into a court of justice of the United States and ask for its specific execution? It was made in direct opposition to the policy of the government, to which it was the duty of every citizen to conform. And, while they saw it exerting all its power to fulfil in good faith its neutral obligations, they made themselves parties to the war, by furnishing means to a general of the Texan army, for the avowed purpose of aiding and assisting him in his military operations.

It might indeed fairly be inferred, from the language of the contract and the statements in the appellants' bill, that the volunteers were to be raised, armed, and equipped within the limits of the United States. The language of the contract is: "That the said party of the second part (that is the complainants), being desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming, and equipping volunteers for Texas, and is in want of means therefor." And as General Chambers was then in the United States, and was, as the contract states, actually engaged at that time in raising, arming, and equipping volunteers, and was in want of means to accomplish his object, the inference would seem to be almost irresistible that these preparations were making at or near

the place where the agreement was made, and that the money was advanced to enable him to raise and equip a military force in the United States. And this inference is the stronger, because no place is mentioned where these preparations are to be made, and the agreement contains no engagement on his part, or proviso on theirs, which prohibited him from using these means and making these military preparations within the limits of the United States.

If this be the correct interpretation of the agreement, the contract is not only void, but the parties who advanced the money were liable to be punished in a criminal prosecution, for a violation of the neutrality laws of the United States. And certainly, with such strong indications of a criminal intent, and without any averment in the bill from which their innocence can be inferred, a court of chancery would never lend its aid to carry the agreement into specific execution, but would leave the parties to seek their remedy at law. And this ground would of itself be sufficient to justify the decree of the District Court dismissing the bill.

But the decision stands on broader and firmer ground, and this agreement cannot be sustained either at law or in equity. The question is not whether the parties to this contract violated the neutrality laws of the United States or subjected themselves to a criminal prosecution; but whether such a contract, made at that time, within the United States, for the purposes stated in the contract and the bill of complaint, was a legal and valid contract, and such as to entitle either party to the aid of the courts of justice of the United States to enforce its execution.

The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the

citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And if he does so he cannot claim the aid of a court of justice to enforce it. The appellants say, in their contract, that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power.

But it has been urged in the argument that Texas was in fact independent, and a sovereign state at the time of this agreement; and that the citizen of a neutral nation may lawfully lend money to one that is engaged in war, to enable it to carry on hostilities against its enemy.

It is not necessary, in the case before us, to decide how far the judicial tribunals of the United States would enforce a contract like this, when two states, acknowledged to be independent, were at war, and this country neutral. It is a sufficient answer to the argument to say that the question whether Texas had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexcian territory. And if we undertook to inquire whether she had not in fact become an independent sovereign state before she was recognized as such by the treaty-making power, we should take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the Constitution has conferred exclusively upon another department.

This is not a new question. It came before the court in the case of *Rose* v. *Himely*, 4 Cr. 272, and again in *Hoyt* v. *Gelston*, 3 Wheat. 324. And in both of these cases the court said, that it belongs exclusively to governments to recognize new states in the revolutions

which may occur in the world; and until such recognition, either by our own government or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered.

It was upon this ground that the Court of Common Pleas in England, in the case of *De Wutz* v. *Hendricks*, 9 Moore's C. B. Reports, 586, decided that it was contrary to the law of nations for persons residing in England to enter into engagements to raise money by way of loan for the purpose of supporting subjects of a foreign state in arms against a government in friendship with England, and that no right of action attached upon any such contract. And this decision is quoted with approbation by Chancellor Kent, in 1 Kent's Com. 116.

Nor can the subsequent acknowledgment of the independence of Texas, and her admission into the Union as a sovereign State, affect the question. The agreement being illegal and absolutely void at the time it was made, it can derive no force or validity from events which afterwards happened.

But it is insisted, on the part of the appellants, that this contract was to be executed in Texas, and was valid by the laws of Texas, and that the District Court for that State, in a controversy between individuals, was bound to administer the laws of the State, and ought therefore to have enforced this agreement.

This argument is founded in part on a mistake of the fact. The contract was not only made in Cincinnati, but all the stipulations on the part of the appellants were to be performed there and not in Texas. And the advance of money which they agreed to make for military purposes was in fact made and intended to be made in Cincinnati, by the delivery of their promissory notes, which were accepted by the appellee as payment of the money. This appears on the face of the contract. And it is this advance of money for the purposes mentioned in the agreement, in contravention of the neutral obligations and policy of the United States, that avoids the contract. The mere agreement to accept a conveyance of land lying in Texas, for a valuable consideration paid by them, would have been free from objection.

But had the fact been otherwise, certainly no law of Texas then or now in force could absolve a citizen of the United States, while he continued such, from his duty to this government, nor compel a court of the United States to support a contract, no matter where made or where to be executed, if that contract was in violation of their laws, or contravened the public policy of the government, or was in conflict with subsisting treaties with a foreign nation.

We therefore hold this contract to be illegal and void, and affirm the decree of the District Court.

Mr. Justice Daniel and Mr. Justice Grier dissented.[1]

(*b*) *Ships, Munitions, and other Supplies.*

UNITED STATES v. TRUMBULL.

U. S. District Court for California, 1891.

(48 *Federal Reporter*, 99.)

Indictment of Trumbull and Burt for violation of neutrality laws.

Ross, J.: —

"The indictment in this case contains 11 counts, the first 4 of which, in effect, charge that on the 9th day of May, 1891, at a certain designated place in this judicial district, near the island of San Clemente, the defendants unlawfully attempted to fit out and arm, fitted out and armed, procured to be fitted out and armed, and were knowingly concerned in furnishing, fitting out, and arming, a certain steamship called the *Itata*, which was then and there in the possession and under the control of certain citizens of the republic of Chile, known as the 'Congressional Party,' and who were then and there, in said republic, organized and banded together in great numbers in armed rebellion and attempted revolution, and carrying on war against the republic of Chile, and the government thereof, with which the United States, then and at the time of the finding of the indictment were at peace, with intent that said ship should be employed in the service of the aforesaid Congressional Party, to cruise or commit hostilities against the then established and recognized government of Chile, with which this government then was at peace, contrary to the provisions of section 5283 of the Revised Statutes of the United States, which section is as follows:—

"'Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of, any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or who issues and delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she shall be so employed, shall be

[1] On the subject of aid to insurgents, see 1 Halleck, 84, note 2. — Ed.

deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building or equipment thereof, shall be forfeited, one-half to the use of the informer, and the other half to the use of the United States.'

"The next three counts of the indictment, in effect, charge that the defendants, at the same time and place, increased, unlawfully procured to be increased, and were knowingly concerned in increasing, the force of a certain ship of war and armed steamship called *Itata*, which arrived at the port of San Diego in this judicial district on the 2d day of May, 1891, and was at the time of her said arrival, and to and including the 9th day of May, 1891 (during which time she remained within the jurisdiction of the United States, and of this court), a ship of war in the service of a certain foreign people called the 'Congressional Party,' then citizens of and residing in the republic of Chile, and who were then and there banded together in large numbers, in open-armed rebellion, and attempted forcible revolution, and making war against, and being at war with a certain foreign state, namely, the republic of Chile, and the lawful government thereof, with which the United States then, and at the finding of the indictment, were at peace, by adding to the force of said armed vessel an equipment solely applicable to war, viz., by adding to her equipment 10,000 rifles, 10,000 bayonets, and 500,000 cartridges therefor, contrary to the provisions of Section 5285 of the Revised Statutes of the United States, which is as follows:—

"'Every person who, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be deemed guilty of a high misdemeanor, and shall be fined not more than one thousand dollars, and imprisoned not more than one year.'

"The last four counts of the indictment, in effect, charge that the defendants, at the same time and place, began, set on foot, provided the means for, and prepared the means for, a certain military expedition to be carried on from thence against the territory and domin-

ions of a foreign state, namely, the republic of Chile,—the United States, then and there, and at the time of the finding of the indictment, being at peace with said republic,—contrary to the provisions of section 5286 of the Revised Statutes of the United States, which is as follows:

"'Every person who, within the territory of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.'

"The evidence introduced by the United States in support of the indictment being concluded, the court is asked by the defendants to direct the jury to return a verdict of not guilty, on the ground that the evidence introduced on the part of the prosecution is insufficient to sustain any count of the indictment. For the purposes of the motion, every fact that the evidence tends to establish must, of course, be considered as proven.

"Briefly stated, these facts are as follows: In January of this year the steamship *Itata* was an ordinary merchant vessel. Early in that month she was captured in the harbor of Valparaiso, Chile, by the people designated in this indictment as the 'Congressional Party,' and who were then engaged in an effort to overthrow the then established and recognized government of Chile, of which Balmaceda was the head. The *Itata* was by the Congressional Party put in command of one of its officers, and was used in their undertaking as a transport to convey troops, provisions, and munitions of war, and also as an hospital ship, and one in which to confine prisoners. Four small cannon were also put upon her decks and she carried a jack and pennant. Some time prior to the following April the defendant Trumbull came to the United States as an agent of the Congressional Party, and about the month of April went to the city of New York, and there bought from one of the large mercantile firms of that city, dealing in such matters, 5,000 rifles and 2,000,000 cartridges therefor, with the intention and for the purpose of sending them to the Congressional Party in Chile for use in their efforts to overthrow the Balmacedan government. The sale and purchase of the arms and ammunition were made in the usual course of trade. Trumbull caused them to be shipped by rail to San Francisco, and engaged the defendant Burt to accompany them, which he did. Arrangements had been made by Trumbull with his principals in Chile,

by which they were to send a vessel to the United States to get the arms and ammunition, and convey them to Chile for the use of the Congressional Party there. The *Itata* was dispatched by that party for that purpose, and was accompanied as far as Cape San Lucas by the *Esmeralda*, a war ship then in the service of the Congressional Party. At one of the Chilean ports the *Itata* took on board some soldiers, with their arms, by one witness stated to be about 150, and by another to be about 12, in number.

"At San Lucas the captain of the *Esmeralda* took command of the *Itata*, and the captain of the latter was left there in command of the *Esmeralda*. The *Itata* then proceeded to San Diego, really in command of the *Esmeralda's* captain, but ostensibly in command of another, who represented to the customs officers at that port that she was an ordinary merchantman, and was bound to some port on the northern coast. Before coming into the port of San Diego, or into the waters of the United States, the *Itata* hauled down her jack and pennant, the cannon theretofore carried on her decks were removed and stowed in her hold, as were also the arms of the soldiers she carried; and their uniforms, as well as those of the officers, were removed, and all appeared in civilian's dress. At that port she laid in stores of coal and provisions, all of which were bought in the open market, and some of which were marked 'Esmeralda.'

"Meanwhile Trumbull had chartered a schooner, called the *Robert and Minnie*, in San Francisco to take the arms and ammunition from there to a point in this judicial district, then expected to be near the island of Catalina, where she could meet the *Itata*, and deliver them on board of her to be conveyed to Chile for the purposes already stated. The schooner *Robert and Minnie* accordingly took on board the arms and ammunition at the port of San Francisco, and, in charge of the defendant Burt, proceeded to the neighborhood of Catalina Island, where she expected to meet the *Itata*. In the meantime the suspicion of some of the officers of the United States that the neutrality laws were being violated was aroused, and the marshal of this district was directed by the attorney-general to detain the *Itata*, if such was found to be the case; and, acting upon those and certain instructions from the district attorney of the judicial district, he went on board the ship at San Diego, and put a keeper in charge of her, and then went in search of the *Robert and Minnie*, which he did not find in the waters of the United States. Communication was, however, had between the *Itata* and the schooner and a point near San Clemente Island was fixed upon as the place of meeting for the purpose of transferring the arms and ammunition from the schooner to the ship. Accordingly, the *Itata*, on the 6th of May, 1891, with-

out obtaining clearance papers, and against the protest of the person left on board and in charge of her by the marshal, weighed anchor, and steamed out of the harbor of San Diego, with him on board, to meet the *Robert and Minnie*, and receive the arms and ammunition. The marshal's keeper was, however, put ashore at Point Ballast, before leaving the harbor. While steaming out of it, one or more of the *Itata's* cannon were brought on deck, and some of the soldiers on board of her appeared in uniform. On the 9th of May, the *Itata* and *Robert and Minnie* came together about a mile and a half southerly of San Clemente Island, and there the arms and ammunition in question were taken from the schooner, and put on board the ship in original packages, and the latter at once left with them for Chile.

"No evidence was introduced tending to show that the Congressional Party ever received any recognition of any character from the government of the United States until September 4th, when it was recognized as the established and only government of Chile.

"But since the argument and submission of the motion, the counsel for the United States have called the attention of the court to the following facts furnished by the respective departments, to-wit: On March 4th, the secretary of the navy cabled Admiral McCann 'to proceed to Valparaiso, and observe strict neutrality, and take no part in troubles between parties further than to protect American interests.' On March 26th, the secretary of the navy cabled Admiral Brown, who had superseded Admiral McCann, 'to abstain from proceedings in nature of assistance to either, that is, the Balmaceda or Congressional Party; that the ships of the latter were not to be treated as piratical, so long as they waged war only against the Balmaceda government.' On April 25th, Secretary of State Blaine cabled the American minister, 'You can act as mediator with Brazilian minister and French *chargé d'affaires*.' On May 5th, Minister Eagan cabled this government, 'Government of Chile and revolutionists have accepted mediation of the United States, Brazil, and France most cordially; those of England and Germany declined.' On May 7th, Acting Secretary of State Wharton acknowledged the dispatch of Minister Eagan, and 'expressed hope that through combined efforts of the governments in question, the strife which has been going on in Chile may be speedily and happily terminated.' On May 14th Acting Secretary of State Wharton cabled Minister Eagan that 'French minister reports threats to shoot the insurgent envoys by Balmaceda,' and directed that they should have ordinary treatment under flag of truce.

"The foregoing are the facts of the case as now presented, and the question the court is called upon to decide is whether they are suffi-

cient to justify a verdict against the defendants upon any count of the indictment. The counsel for the United States concede that they are insufficient to justify a verdict against the defendants under either of the counts that are based on section 5285 of the Revised Statutes. It seems to me the same thing is equally true in respect to those counts that are based on section 5286. The very terms of that statute imply that the military expeditions or enterprises thereby prohibited are such as originate within the limits of the United States, and are to be carried on from this country. 'Every person who, within the limits or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprises, to be carried on from thence,'—that is to say, from the United States,—is the language of the statute.

"If the evidence shows that in this case there ever was any military expedition begun or set on foot, or provided or prepared for, within the sense of this statute, it was begun, set on foot, provided and prepared for in Chile, and was to be carried on from Chile, and not from the United States. But I think it perfectly clear that the sending of a ship from Chile to the United States, to take on board arms and ammunition purchased in this country, and carry them back to Chile, is not the beginning, setting on foot, providing or preparing the means for any military expedition or enterprise, within the meaning of section 5286 of the Revised Statutes.

"The cases of *The Mary A. Hogan*, 18 Fed. Rep., 529; *U. S.* v. *Two Hundred and Fourteen Boxes of Arms, etc.*, 20 Fed. Rep., 50; and *U. S.* v. *Rand*, 17 Fed. Rep., 142, cited by counsel for the United States in support of their position in respect to this point, do not at all support it. In each of those cases there was a military expedition, and it was organized within, started from, and was to be carried on from the United States. The facts of those cases are wholly different from the facts of the present case.

"There remains for consideration the four counts of the indictment that are based on section 5283 of the Revised Statutes. The first of these, as has been seen, charges that the defendants, on the 9th of May last, at a certain designated place within this judicial district, unlawfully fitted out and armed a certain steamship called the *Itata*, which was then and there in the possession and under the control of certain citizens of the republic of Chile, known as the 'Congressional Party,' and who were then and there, in said republic, organized and banded together in great numbers in armed rebellion and attempted revolution, and carrying on war against the republic of Chile and the government thereof, with which the United States then, and at the time of the finding of the indictment, were at

peace, with intent that said ship should be employed in the service of the aforesaid Congressional Party, to cruise or commit hostilities against the then established and recognized government of Chile, with which this government then was at peace. The second count charges that the defendants, at the same time and place, attempted to do the same thing; the third count charges that, at the same time and place, they unlawfully procured the same thing to be done; and the fourth, that, at the same time and place, defendants were 'unlawfully and knowingly concerned in the furnishing, fitting out, and arming of the *Itata*, with intent, etc.

"It is contended on behalf of the defendants that section 5283 has no application to this case, for the reason that the people designated in the indictment as the 'Congressional Party' do not constitute a people, within the meaning of that section. It is beyond question that the *status* of the people composing the Congressional Party at the time of the commission of the alleged offense, is to be regarded by the court as it was then regarded by the political or executive department of the United States. This doctrine is firmly established. *Gelston* v. *Hoyt*, 3 Wheat., 246, 324; *U. S.* v. *Palmer*, Id., 610, 635; *Kennett* v. *Chambers*, 14 How., 38; Whart. Int. Law Dig., pp. 551, 552, and cases there cited.

"If the dispatches from the secretary of the navy, the secretary of state, and acting secretary of state, already referred to, are to be considered as indicating the light in which the people composing the Congressional Party of Chile were regarded by the executive department of this government prior to their recognition, on the 4th of September, the position of the United States towards them seems to have been similar to that taken by the United States towards the insurgents against Hayti in 1869. That position was thus stated by Mr. Fish, then secretary of state, in a letter dated September 14, 1869:—

"'(1) That we do not dispute the right of the government of Hayti to treat the officers and crew of the *Quaker City* and *Florida* (vessels in the service of the insurgents against Hayti) as pirates for all intents and purposes. How they are to be regarded by their own legitimate government is a question of municipal law, into which we have no occasion, if we had the right, to enter.

"'(2) That this government is not aware of any reason which would require or justify it in looking upon the vessel named in a different light from any other vessel employed in the service of the insurgents.

"'(3) That, regarding them simply as armed cruisers of the insurgents, not yet acknowledged by this government to have obtained

belligerent rights, it is competent to the United States to deny and resist the exercises by those vessels, or any other agents of the rebellion, of the privileges which attend maritime war, in respect to our citizens or their property entitled to their protection. We may or may not, at option, as justice or policy may require, treat them as pirates in the absolute and unqualified sense, or we may, as the circumstances of any actual case shall suggest, waive the extreme right, and recognize, where facts warrant it, an actual intent, on the part of the individual offenders, not to depredate in a criminal sense and for private gain, but to capture and destroy *jure belli*. It is sufficient for the present purpose, that the United States will not admit any commission or authority proceeding from rebels as a justification or excuse for injury to persons or property entitled to the protection of this government. They will not tolerate the search or stopping, by cruisers in the rebel service, of vessels of the United States, nor any other act which is only privileged by recognized belligerency.

"'(4) While asserting the right to capture and destroy the vessels in question, and others of similar character, if any aggression upon persons or property entitled to the protection of this government shall recommend such action, we cannot admit the existence of any obligation to do so in the interest of Hayti or of the general security of commerce.' 3 Whart. Int. Law Dig., pp. 465, 466.

"Does section 5283 of the Revised Statutes apply to any people whom it is optional with the United States to treat as pirates? That section is found in the chapter headed 'Neutrality,' and it was carried into the Revised Statutes, and was originally enacted in furtherance of the obligations of the nation as a neutral. The very idea of neutrality imports that the neutral will treat each contending party alike; that it will accord no right or privilege to one that it withholds from the other, and will withhold none from one that it accords to the other. In the case of *U. S.* v. *Quincy*, 6 Pet., 445, the Supreme Court of the United States said that the word 'people' in the 3d section of the act of April 20, 1818 (and from that carried into the Revised Statutes as section 5283), 'is one of the denominations applied by the act of Congress to a foreign power.' This can hardly mean an association of people in no way recognized by the United States, or by the government against which they are rebelling, whose rebellion has not attained the dignity of war, and who may, at the option of the United States, be treated by them as pirates. Prior to the passage of the act of April 20, 1818, the Supreme Court of the United States, in the case of *Gelston* v. *Hoyt*, 3 Wheat., 246, speaking through Mr. Justice STORY, held that sec-

tion 3 of the act of 1794, prohibiting the fitting out any ship, etc., for the service of any foreign prince or state, to cruise against the subjects, etc., of any foreign prince or state, with which the United States were at peace, did not apply to any new government, unless it had been recognized by the United States or by the government of the country to which such new country belonged; and that a plea which set up a forfeiture under that act, in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad.

"Congress, in passing the subsequent act of April 20, 1818, by which the provision referred to of the act of 1794 was, in substance, re-enacted, must be presumed to have known the construction that had been theretofore put by the Supreme Court upon the words 'prince or state' in the act of 1794, and with that knowledge, in passing the act of 1818, inserted in the same clause the words 'colony, district, or people.'

"This was done, according to Dana's Wheat. Int. Law, § 439, note 215, and Wharton's Int. Law Dig., p. 561, upon the suggestion of the Spanish minister that the South American provinces, then in revolt, and not recognized as independent, might not be included in the word 'state.' But in every one of those instances the United States had acknowledged the existence of a state of war, and, as a consequence, the belligerent rights of the provinces. *The Ambrose Light*, 25 Fed. Rep., 414, and references there made.

"It will be observed that the Supreme Court, in the case of *Gelston* v. *Hoyt* did not say that the independence of the new government must have been recognized by the United States to make the statute of which it was speaking applicable. There are different kinds or degrees of recognition, but can it be properly said that, in passing an act in furtherance of the obligations of the nation as a neutral, Congress was legislating with reference to a people not in any way recognized by the government of the United States, and whom it might, at its option, treat as pirates? 'To fall within the statute,' said Judge Brown, in the case of *The Curondelet*, 37 Fed. Rep., 800, 'the vessel must be intended to be employed in the service of one foreign prince, state, colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of another, with whom the United States are at peace. The United States can hardly be said to be at peace, in the sense of the statute, with a faction which they are unwilling to recognize as a government; nor could the cruising or committing of hostilities against such a mere faction well be said to be committing hostilities against the 'subjects, citizens, or property of a district or people, within the meaning

of the statute. So on the other hand, a vessel, in entering the service of the opposite faction of Hippolyte, could hardly be said to enter the service of a foreign 'prince or state, or of a colony, district or people,' unless our government had recognized Hippolyte's faction as at least constituting a belligerent, which it does not appear to have done.' Attorney-General Hoar, however, in a letter to Mr. Fish, secretary of state, of date December 16, 1869 (13 Op. Atty. Gen. U. S., 177), said:—

"'Undoubtedly the ordinary application of the statute [in question] is to cases where the United States intends to maintain its neutrality in wars between two other nations, or where both parties to a contest have been recognized as belligerents; that is, as having a sufficiently organized political existence to enable them to carry on war. But the statute is not confined in its terms, nor, as it seems to me, in its scope and proper effect, to such cases. Under it, any persons who are insurgents, or engaged in what would be regarded under our law as levying war against the sovereign power of the nation, though few in number and occupying however small a territory, might procure the fitting out and arming of vessels with intent to commit hostilities against a nation with which we were at peace, and with intent that they should be employed in the service of a colony, district, or people, not waging a recognized war.'

"The attention of Attorney-General Hoar does not appear to have been attracted to the decisions of the Supreme Court and other cases above cited, nor are any authorities cited in support of the views expressed by him. In my opinion, it is, to say the least, extremely doubtful whether section 5283 of the Revised Statutes applies to the present case. But, assuming that it does, the evidence does not sustain the charges based upon it. It does not show, or tend to show, that the defendants, or either of them, attempted to do, or procured to be done, or were concerned in doing, anything that they did not in fact do.

"What the evidence shows that they did do has already been stated. If none of those acts constituted the arming, fitting out, or furnishing the *Itata* with the intent that she should be employed to cruise or commit hostilities against the then established government of Chile, it necessarily follows that the prosecution has failed to prove the case alleged against the defendants, and the motion made on their behalf should be granted. One of the counsel for the United States conceded, on the argument, that the evidence is insufficient to show that the defendants fitted out and armed the *Itata*, but he contended strenuously that it is sufficient to show that they were knowingly concerned in 'furnishing' her. Of course, if he is right in the

concession, it results that the first count is not established by proof; and, since the evidence does not tend to show that the defendants, or either of them, attempted to do, or procured to be done, anything they did not in fact do, the second and third counts would also fall. If, as is thus conceded, and as seems to me to be clear, the putting on board the *Itata* of the arms and ammunition, under the circumstances and for the purposes stated, did not constitute the fitting out and arming of that vessel, it is difficult to understand how the same acts, committed under the same circumstances and for the same purposes, constituted the 'furnishing' of her. There is nothing in the evidence tending to show that any of the arms or ammunition were intended for use by the *Itata*. On the contrary, the whole case shows that the defendants caused them to be put on board of her with the intention that she should transport them to Chile, for the use of the insurrecting party there.

"This does not constitute the fitting out, arming, or furnishing of the *Itata*, with intent that she should be employed to cruise or commit hostilities in the service of the insurrectionary party against the then government of Chile. In principle, the case is, I think, much like that of *The Florida*, decided by Judge Blatchford in 1871, and reported in 4 Ben., 452. This was a suit against the *Florida* for an alleged forfeiture incurred under the third section of the act of April 20, 1818, now, in substance, section 5283 of the Revised Statutes.

"The court said:—

"'Admitting that persons acting as agents of the insurrectionary party in Cuba were the real owners of the vessel and her cargo of arms and munitions of war, and that the transaction of the borrowing, by Darr from Castillo, of the money wherewith the vessel and her cargo were purchased, was a sham, and that the vessel was to proceed with her cargo to Vera Cruz, and there vessel and cargo were to be transferred by Darr, their nominal owner, to persons acting for the insurrectionary party in Cuba, and that thence the vessel was to take the cargo to some point off the coast of Cuba, and land it on the shore by the use of rafts made out of the lumber on board, towed by the steam-launch on board, through shallow water, to the shore, and that Darr and such real owners of the vessel and cargo had an intent to do all this in fitting out the vessel, and putting her cargo on board, still a violation of the third section of the act 1818 is not thereby made out. A vessel fitted out with intent to do this, is not fitted out with intent to cruise or commit hostilities, within the sense of that section. If so, then every vessel fitted out to run a blockade, with a cargo of munitions of war, is necessarily fitted out, within the sense of that section, to commit

hostilities against the country whose forces have instituted the blockade. * * * There is no satisfactory evidence that the vessel was furnished or fitted out or armed, or attempted to be furnished or fitted out or armed, with intent that she should be employed to cruise or commit hostilities, in the sense of the third section of the act, in the service of the insurrectionary party in Cuba, against the government of Spain. There is no evidence that she was intended to do anything more than transport her cargo to the coast of Cuba, and cause it to be landed there on rafts, by the aid of the launch on board. To do this was no violation of the third section of the act, which is the one on which the libel is founded.'

"In a letter from Attorney-General Speed to Mr. Seward, then secretary of state, he said :—

"'I know of no law or regulation which forbids any person or government, whether the political designation be real or assumed, from purchasing arms from the citizens of the United States, and shipping them at the risk of the purchaser.' 11 Op. Atty.-Gen. U. S., 452.

"The fact that secrecy and deception were resorted to in the present case, as was also done in the case of the *Florida*, cannot bring it within the purview of the statute, if not otherwise within it; nor can the circumstance that the *Itata*, in leaving the port of San Diego in the manner disclosed by the evidence, violated other provisions of law. The case alleged must, of course, be proved; otherwise the defendants are entitled to a verdict of not guilty.

"Entertaining the views above expressed, it becomes unnecessary to decide what effect, if any, should otherwise be given in this case to the recognition by the United States, on the 4th of September, of the government established by the Congressional Party, or to determine other questions raised, all of which have been elaborately and very ably argued by counsel.

"The evidence introduced on behalf of the prosecution being, in my opinion, insufficient to warrant a conviction under either count of the indictments, the motion made on behalf of the defendants is granted, and the jury are instructed to find a verdict of not guilty." [1]

[1] Affirmed by the Circuit Court of Appeals, May 8, 1893, 56 Fed. 505. — Ed.

THE "SALVADOR."

PRIVY COUNCIL, 1870.

(3 *Privy Council Rep.* 218.)

The Proclamation of the 24th of March, 1869, stated that an insurrection against the Government of Spain was reported to have taken place, and to be then existing in the Island of Cuba, and upon the fact of that report being well-founded, and a state of insurrection actually existing in Cuba, the Proclamation against Her Majesty's subjects in the Bahamas enlisting or engaging in a Foreign service in aid of such insurrection was legally and properly issued.

All the witnesses show, and the learned Judge of the Vice-Admiralty Court below himself admits, that there was a very serious insurrection or revolt in the Island of Cuba against the Spanish Government. But the learned Judge, though apparently satisfied that there was a state of insurrection in Cuba, hesitates to apply the penal section of the "Foreign Enlistment Act, because he cannot find that such insurrection is in favor of any persons assuming the powers of Government, or pretended Government, in the Island of Cuba; though the nature and object of the expedition for which the *Salvador* was equipped and fitted-out is from the evidence proved to have been in aid of this insurrection, and she, being a British vessel, was engaged in and for a military expedition, for the purpose of attacking the dominions of a friendly Power, yet the Judge of the Vice-Admiralty Court refused to declare the vessel liable to forfeiture within the meaning of the 7th section of the Act.

Their Lordships' judgment was delivered by Lord CAIRNS:—

"This is an appeal from the decision of the Vice-Admiralty Court of the Bahamas, upon an information filed on behalf of the Crown before that Court under the Foreign Enlistment Act, with regard to the ship *Salvador*, and seeking her confiscation.

"The section in the Foreign Enlistment Act which has to be considered is the seventh. It has frequently been remarked, that the interpretation of that section is attended with some difficulty, mainly owing to the great quantity of words which are used in the clause; but endeavoring for the moment to set aside the verbiage of the section, it is obvious that, in order to constitute an offence under it, five propositions must be established. In the first place, the ship, which in other respects is found to be acting within the meaning of

the section, must be acting without the leave and license of the Sovereign of this Country. That is the first element of the charge under the section. The second is this, the ship must be equipped, furnished, fitted-out or armed, or there must be a procuring, or an attempt or endeavor to equip, furnish, fit-out, or arm the ship. The third is, that the equipping, furnishing, fitting-out, or arming of the ship must be done with the intent or in order that the ship or vessel shall be employed in the service of some 'foreign Prince, State, or Potentate, or some foreign colony, province, or part of any province or people, or of any person or persons exercising, or assuming to exercise, any powers of government in or over any foreign State, colony, province, or part of any province or people.'

"Then the fourth element in the section is this, there must be an intent to employ the ship in one of two capacities either 'as a transport or storeship, against any Prince, State, or Potentate,' or 'with intent to cruise or commit hostilities against any Prince, State, or Potentate.' I pause for the purpose of observing that the words are not very happily chosen which represent her as being employed 'as a transport or storeship against any Prince, State, or Potentate;' but it is clear, open as the words may be to criticism, that the intent is, that the ship should be employed in one of the two capacities I have mentioned, and not only so, but employed 'against,' that is in the way of aggression against, some foreign Prince, Potentate, or State. This should be done, as I have already said, against some Prince, State, or Potentate, 'or against the subjects or citizens of any Prince, State, or Potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province, or part of any province or country, or against the inhabitants of any foreign colony, province, or part of any province or country.' And the fifth element is, that this foreign State or Potentate, and so on, should be one with whom the Sovereign of this country should not then be at war.

"Those are the five elements which go to make up the whole charge under the 7th section.

"Now, with regard to the first which I have mentioned, the absence of leave and licence on the part of Her Majesty, no question arises.

"With regard to the second, namely, that there must be an equipping, furnishing, fitting-up, or arming, or a procuring, or an attempt to do so, no question can arise in this case when we read the evidence of Mr. Dumaresq, the Receiver-General and Treasurer of the Island, who states the condition in which he found the ship, and the preparations made on board of her, which seem to their Lordships to

amount to a fitting-out or arming, or an attempt to do so, within the meaning of this section. The learned Judge of the Vice-Admiralty Court seems to have entertained no doubt himself upon this part of the case.

"I pass over the third element which I mentioned, for the moment, in order to say that upon the fourth and fifth heads to which I have referred there can also be no doubt entertained, as it seems to their Lordships; and here, again, no doubt was entertained by the learned Judge of the Court below. It is quite clear, that the ship was intended to be used as a transport or storeship against a Prince, State, or Potentate with whom Her Majesty was not at war. She was to be used obviously as a transport or storeship for the purpose of conveying to Cuba men and materials; and in that way to do the duty of a transport ship, and so to inflict injury upon the Spanish government, who, at that time were, and are now, the lawful authority having the dominion over Cuba. Here, again, no doubt was entertained by the learned Judge in the Court below, and no doubt could be entertained by any one who looks at the evidence of Mr. Dumaresq, to whom I have already adverted, and also the evidence of Mr. Butler, the collector of revenue, both of whom state what the report was which was made to themselves by Carlin, the master of this vessel, as to her conduct when she went to the coast of Cuba—how she landed all the men she had on board, plainly for the purpose of taking part in the insurrection which was going on in Cuba—how they abandoned the ship when they saw a Spanish ship of war in sight—how they were prepared to set fire to their ship if the Spanish ship approached them—and how afterwards, when they found that they were unnoticed, they took possession of the *Salvador* again, and brought her back to Nassau.

"That leaves uncovered only the third element of charge in this section, and it is upon that alone that the learned Judge of the Vice-Admiralty Court entertained any doubt.

"The third element is, that the ship must be employed in this way in the service of some 'foreign Prince, State, or Potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of Government in or over any foreign State, colony, province, or part of any province or people.' It is to be observed that this part of the section is in the alternative. The ship may be employed in the service of a foreign Prince, State, or Potentate, or foreign State, colony, province, or part of any province or people; that is to say, if you find any consolidated body in the foreign State, whether it be the Potentate, who has the absolute dominion, or the Government,

or a part of the province or of the people, or the whole of the province or the people acting for themselves, that is sufficient.

"But by way of alternative, it is suggested that there may be a case where, although you cannot say that the province, or the people, or a part of the province or people are employing the ship, there yet may be some person or persons who may be exercising, or assuming to exercise, powers of Government in the foreign colony or State, drawing the whole of the material for the hostile proceedings from abroad; and, therefore, by way of alternative, it is stated to be sufficient, if you find the ship prepared or acting in the service of 'any person or persons exercising, or assuming to exercise, any powers of Government in or over any foreign State, colony, province, or part of any province or people;' but that alternative need not be resorted to, if you find the ship is fitted-out and armed for the purpose of being 'employed in the service of any foreign State or people, or part of any province or people.'

"Upon that the observation of the learned Judge was this:—'We have no evidence of the object of the insurrection, who are the leaders, what portion of Cuba they have possession of, in what manner this insurrection is controlled or supported, or in what manner they govern themselves. How, therefore, can I say that they are assuming the powers of Government in or over any part of the Island of Cuba?'

"Now, it appears to their Lordships, that the error into which the learned Judge below fell, was in confining his attention to what I have termed the second alternative of this part of the section, and in disregarding the first part of the alternative. It may be (it is not necessary to decide whether it is so or not) that you could not state who were the person or persons, or that there were any person or persons exercising, or assuming to exercise, powers of Government in Cuba, in opposition to the Spanish authorities.

"That may be so: their Lordships express no opinion upon that subject, but they will assume that there might be a difficulty in bringing the case within that second alternative of the section; but their Lordships are clearly of opinion, that there is no difficulty in bringing the case under the first alternative of the section, because their Lordships find these propositions established beyond all doubt, —there was an insurrection in the Island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these insurgents, beyond all doubt, formed part of the province or people of Cuba; and beyond all doubt the ship in question was to be employed, and was employed, in connection with and in the service of this body of insurgents.

"Those propositions being established, as their Lordships think they clearly are established, both by the evidence of Dumaresq and Butler, to which I have already referred, and further, by the evidence of the three witnesses, Loinaz, Wells, and Mama, their Lordships think that the requisitions of the seventh section in this respect are entirely fulfilled, and that the case is made out under this head, as it is upon all other heads of the section.

"Their Lordships, therefore, will humbly recommend to Her Majesty that the decision of the Vice-Admiralty Court should be reversed, and that judgment should be pronounced for the Crown, according to the prayer of the information.

"It has been intimated to their Lordships, that on the 7th of February last, there was a decree by their Lordships for the appraisement and sale of the vessel. She has been sold, and the net proceeds, £163, 4*s.* 8*d.*, paid into Her Majesty's Commissariat Chest in the Bahamas. The Colonial Government, it appears, have incurred expenses to the amount of £145, 5*s.* 10*d.* in keeping the vessel while she was under arrest, and they claim to be reimbursed those expenses out of the proceeds of the sale. That, of course, will be proper, and if it is necessary to make that part of this Order, it will be done."[1]

[1] During the Franco-Prussian war, the government of the United States proceeded to sell a quantity of arms and munitions which it had accumulated during the civil war, but with no intention that these articles should go into the hands of either belligerent. The committee reported that the sale was lawful and proper, and would have been so, if the sale had been made directly to one of the belligerents. See the Senate Report, 42d Cong., 2d sess , Rep. 183. And see House Report, 46, 42d Cong., 2d sess.

Perels, Int. Seerecht, 251, says that the Government of the United States sold in October, 1870, at public auction, 500,000 muskets, 163 carbines, 35,000 revolvers, 40,000 sabres, 20,000 horse-trappings, and 50 batteries with ammunition; and that the export from New York to France from September to the middle of December of that year included 378,000 muskets, 45,000,000 *patronen*, 55 cannon, and 2,000 pistols. 3 Wharton's Digest, p. 513.

It is to be hoped that the report of the Senate committee does not express the settled law of the United States upon this subject. It confounds the rights and duties of a neutral state with those of the private citizens of a neutral state, which is a very different matter. Such a transaction, however innocent the intention, can hardly fail to raise the suspicion of bad faith on the part of neutral government. For it is undoubtedly true that a war between foreign states provides just the opportunity for the sale of such articles to the best advantage. — Ed.

THE "THREE FRIENDS."

SUPREME COURT OF THE UNITED STATES, 1896.

(166 *United States*, 1.)

The steamer *Three Friends* was seized November 7, 1896, by the collector of customs for the district of St. John's, Florida, as forfeited to the United States under section 5283 of the Revised Statutes, and thereupon, November 12, was libelled on behalf of the United States in the District Court for the Southern District of Florida.

Mr. Chief Justice FULLER delivered the opinion of the court.[1]

We agree with the district judge that the contention that forfeiture under section 5283 depends upon the conviction of a person or persons for doing the acts denounced is untenable. The suit is a civil suit *in rem* for the condemnation of the vessel only, and is not a criminal prosecution. The two proceedings are wholly independent and pursued in different courts, and the result in each might be different. Indeed, forfeiture might be decreed if the proof showed the prohibited acts were committed though lacking as to the identity of the particular person by whom they were committed. *The Palmyra*, 12 Wheat. 1, 14; *The Ambrose Light*, 25 Fed. Rep. 408; *The Meteor*, 17 Fed. Cas. 178.

The Palmyra was a case of a libel of information against the vessel to forfeit her for a piratical aggression, under certain acts of Congress which made no provision for the personal punishment of the offenders, but it was held that, even if such provision had been made, conviction would not have been necessary to the enforcement of forfeiture. And Mr. Justice Story, delivering the opinion, said: "It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the Crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the Crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the Crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested until the conviction. But

[1] Part of the opinion dealing with questions of procedure has been omitted. — ED.

this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this whether the offence be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been and so this court understands the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by, any criminal proceeding *in personam*." And see *The Malek Adhel*, 2 How. 210; *United States* v. *The Little Charles*, 1 Brock. 347.

The libel alleged that the vessel was "furnished, fitted out, and armed, with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain, in the island of Cuba, to cruise and commit hostilities against the subjects, citizens, and property of the King of Spain, in the island of Cuba, with whom the United States are and were at that date at peace."

The learned district judge held that this was insufficient under section 5283, because it was not alleged "that said vessel had been fitted out with intent that she be employed in the service of a foreign prince or state, or of any colony, district, or people recognized as such by the political power of the United States."

In *Wiborg* v. *United States*, 163 U. S. 632, which was an indictment under section 5286, we referred to the eleven sections from 5281 to 5291, inclusive, which constitute Title LXVII. of the Revised Statutes, and said: "The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency," and the consideration of the present case arising under section 5283 confirms us in the view thus expressed.

It is true that in giving a *résumé* of the sections, we referred to section 5283 as dealing "with fitting out and arming vessels in this country in favor of one foreign power as against another foreign power with which we are at peace," but that was matter of general description, and the entire scope of the section was not required to be indicated.

The title is headed "Neutrality," and usually called, by way of con-

venience, the "Neutrality Act," as the term "Foreign Enlistment Act" is applied to the analogous British statute, but this does not operate as a restriction.

Neutrality, strictly speaking, consists in abstinence from any participation in a public, private or civil war, and in impartiality of conduct toward both parties, but the maintenance unbroken of peaceful relations between two powers, when the domestic peace of one of them is disturbed, is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency. And, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention.

Hence, as Mr. Attorney-General Hoar pointed out, 13 Opinions, 177, 178, though the principal object of the act was "to secure the performance of the duty of the United States, under the law of nations, as a neutral nation in respect of foreign powers," the act is nevertheless an act "to punish certain offences against the United States by fines, imprisonment, and forfeitures, and the act itself defines the precise nature of those offences."

These sections were brought forward from the act of April 20, 1818, 3 Stat. 447, c. 88, entitled, "An act in addition to the 'Act for the punishment of certain crimes against the United States,' and to repeal the acts therein mentioned," which was derived from the act of June 5, 1794, 1 Stat. 381, c. 50, entitled, "An act in addition to the 'Act for the punishment of certain crimes against the United States,'" and the act of March 3, 1817, 3 Stat. 370, c. 58, entitled, "An act more effectually to preserve the neutral relations of the United States."

The piracy act of March 3, 1819, 3 Stat. 510, c. 77, Rev. Stat. §§ 4293, 4294, 4295, 4296, 5368, supplemented the acts of 1817 and 1818.

The act of 1794, which has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality, and a remarkable advance in the development of international law, was recommended to Congress by President Washington in his annual address on December 3, 1793; was drawn by Hamilton, and passed the Senate by the casting vote of Vice-President Adams. Ann. 3d Cong. 11, 67. Its enactment grew out of the proceedings of the then French minister, which called forth President Washington's proclamation of neutrality in the spring of 1793. And though the law of nations had been declared by Chief Justice Jay, in his charge to the grand jury at Richmond, May 22, 1793 (Wharton's State Trials, 49, 56), and by Mr. Justice Wilson, Mr. Justice Iredell and Judge Peters, on the trial of Henfield in July of that year (Id. 66, 84), to be capable

of being enforced in the courts of the United States criminally, as well as civilly, without further legislation, yet it was deemed advisable to pass the act in view of controversy over that position, and, moreover, in order to provide a comprehensive code in prevention of acts by individuals within our jurisdiction inconsistent with our own authority, as well as hostile to friendly powers.

Section 5283 of the Revised Statutes is as follows: [1] —

By referring to section three of the act of June 5, 1794, section one of the act of 1817, and section three of the act of 1818, it will be seen that the words "or of any colony, district, or people" were inserted in the original law by the act of 1817, carried forward by the act of 1818, and so into section 5283.

The immediate occasion of the passage of the act of March 3, 1817, appears to have been a communication, under date of December 20, 1816, from the Portuguese minister to Mr. Monroe, then Secretary of State, informing him of the fitting out of privateers at Baltimore to act against Portugal, in case it should turn out that that government was at war with the "self-styled government of Buenos Ayres," and soliciting "the proposition to Congress of such provisions of law as will prevent such attempts for the future." On December 26, 1816, President Madison sent a special message to Congress, in which he referred to the inefficacy of existing laws "to prevent violations of the obligations of the United States as a nation at peace towards belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States," and, "with a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States," recommended further legislative provisions. This message was transmitted to the minister December 27, and he was promptly officially informed of the passage of the act in the succeeding month of March. *Geneva Arbitration, Case of the United States*, 138. In Mr. Dana's elaborate note to § 439 of his edition of Wheaton, it is said that the words "colony, district, or people" were inserted on the suggestion of the Spanish minister that the South American provinces in revolt and not recognized as independent might not be included in the word "state." Under the circumstances this act was entitled as "to preserve the neutral relations of the United States," while the title of the act of 1794 described it as "in addition" to the Crimes Act of April 30, 1790, 1 Stat. 112, c. 9, and the act of 1818 was entitled in the same way. But there is nothing in all this to indicate that the words "colony, district, or people" had reference solely to communities whose belligerency had been recognized, and the history of the times, an

[1] *U. S.* v. *Trumbull*, *ante*, p. 731. — ED.

interesting review of which has been furnished us by the industry of counsel, does not sustain the view that insurgent districts or bodies, unrecognized as belligerents, were not intended to be embraced. On the contrary, the reasonable conclusion is that the insertion of the words "district or people" should be attributed to the intention to include such bodies, as, for instance, the so-called Oriental Republic of Artigas, and the governments of Pétion and Christophe, whose attitude had been passed on by the courts of New York more than a year before in *Gelston* v. *Hoyt*, 13 Johns. 141, 561, which was then pending in this court on writ of error. There was no reason why they should not have been included, and it is to the extended enumeration as covering revolutionary bodies laying claim to rights of sovereignty, whether recognized or unrecognized, that Chief Justice Marshall manifestly referred in saying, in *The Gran Para*, 7 Wheat. 471, 489, that the act of 1817 "adapts the previous laws to the actual situation of the world." At all events, Congress imposed no limitation on the words "colony, district, or people," by requiring political recognition.

Of course a political community whose independence has been recognized is a "state" under the act; and, if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized, is also embraced by that term, then the words "colony, district, or people," instead of being limited to a political community which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country, in the effort to achieve independence, although recognition of belligerency has not been accorded.

And as agreeably to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent state, concedes to the government recognized the rights, and imposes upon it the obligations, of an independent state in matters relating to the war being waged, no adequate ground is perceived for holding that acts in aid of such a government are not in aid of a state in the sense of the statute.

Contemporaneous decisions are not to the contrary, though they throw no special light upon the precise question.

Gelston v. *Hoyt*, 3 Wheat. 246, decided at February term, 1818 (and below January and February, 1816), was an action of trespass against the collector and surveyor of the port of New York for seizing the ship *American Eagle*, her tackle, apparel, etc. The seizure was made July 10, 1810, by order of President Madison under section three of the act of 1794, corresponding to section 5283. The ship was intended for the service of Pétion against Christophe, who had divided the island of

Hayti between them and were engaged in a bloody contest, but whose belligerency had not been recognized. It was held that the service of "any foreign prince or state" imported a prince or state which had been recognized by the government, and as there was no recognition in any manner, the question whether the recognition of the belligerency of a *de facto* sovereignty would bring it within those words, did not arise.

The case of *The Estrella*, 4 Wheat. 298, involved the capture of a Venezuelan privateer on April 24, 1817. There was a recapture by an American vessel, and the prize thus came before the court at New Orleans for adjudication. The privateer was found to have a regular commission from Bolivar, issued as early as 1816, but it had violated section two of the act of 1794, which is the same as section two of the act of 1818, omitting the words "colony, district, or people" (and is now section 5282 of the Revised Statutes), by enlisting men at New Orleans, provided Venezuela was a state within the meaning of that act. The decision proceeded on the ground that Venezuela was to be so regarded on the theory that recognition of belligerency made the belligerent to that intent a state.

In *The Nueva Anna and Liebre*, 6 Wheat. 193, the record of a prize court at "Galveztown," constituted under the authority of the "Mexican Republic," was offered in proof, and this court refused to recognize the belligerent right claimed, because our government had not acknowledged "the existence of any Mexican republic or state at war with Spain;" and in *The Gran Para*, 7 Wheat. 471, Chief Justice Marshall referred to Buenos Ayres as a state within the meaning of the act of 1794.

Even if the word "state" as previously employed admitted of a less liberal signification, why should the meaning of the words "colony, district, or people" be confined only to parties recognized as belligerent? Neither of these words is used as equivalent to the word "state," for they were added to enlarge the scope of a statute which already contained that word. The statute does not say *foreign* colony, district, or people, nor was it necessary, for the reference is to that which is part of the dominion of a foreign prince or state, though acting in hostility to such prince or state. Nor are the words apt if confined to a belligerent. As argued by counsel for the government, an insurgent colony under the act is the same before as after the recognition of belligerency, as shown by the instance of the colonies of Buenos Ayres and Paraguay, the belligerency of one having been recognized but not of the other, while the statute was plainly applicable to both. Nor is district an appropriate designation of a recognized power *de facto*, since such a power would represent not the territory actually held but the territory

covered by the claim of sovereignty. And the word "people," when not used as the equivalent of state or nation, must apply to a body of persons less than a state or nation, and this meaning would be satisfied by considering it as applicable to any consolidated political body.

In *United States* v. *Quincy*, 6 Pet. 445, 467, an indictment under the third section of the act of 1818, the court disposed of the following, among other points, thus: "The last instruction or opinion asked on the part of the defendant was: That according to the evidence in the cause, the United Provinces of Rio de la Plata is, and was at the time of the offence alleged in the indictment, a government acknowledged by the United States, and thus was a 'state' and not a 'people' within the meaning of the act of Congress under which the defendant is indicted; the word 'people' in that act being intended to describe communities under an existing government not recognized by the United States; and that the indictment therefore cannot be supported on this evidence.

"The indictment charges that the defendant was concerned in fitting out the *Bolivar* with intent that she should be employed in the service of a foreign 'people;' that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence, that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation by the executive department of the government of the United States, before the year 1827. And therefore it is argued that the word 'people' is not properly applicable to that nation or power.

"The objection is one purely technical, and we think not well founded. The word 'people,' as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power. The words are, 'in the service of any foreign prince or state, or of any colony, district, or people.' The application of the word 'people' is rendered sufficiently certain by what follows under the videlicet, 'that is to say, the United Provinces of Rio de la Plata.' This particularizes that which by the word 'people' is left too general. The descriptions are no way repugnant or inconsistent with each other, and may well stand together. That which comes under the videlicet, only serves to explain what is doubtful and obscure in the word 'people.'"

All that was decided was that any obscurity in the word "people" as applied to a recognized government was cured by the videlicet.

Nesbitt v. *Lushington*, 4 T. R. 783, was an action on a policy of insurance in the usual form, and among the perils insured against were "pirates, rovers, thieves," and "arrests, restraints, and detainments of

all kings, princes, and people, of what nation, condition, or quality soever." The vessel with a cargo of corn was driven into a port and was seized by a mob who assumed the government of her and forced the captain to sell the corn at a low price. It was ruled that this was a loss by pirates, and the maxim *noscitur a sociis* was applied by Lord Kenyon and Mr. Justice Buller. Mr. Justice Buller said: "'People' means 'the supreme power;' 'the power of the country,' whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of 'pirates, rogues, thieves;' then having stated all the individual persons, against whose acts they engage, they mention other risks, those occasioned by the acts of 'kings, princes, and *people* of what nation, condition, or quality soever.' Those words therefore must apply to 'nations' in their collective capacity."

As remarked in the brief of Messrs. Richard H. Dana, Jr., and Horace Gray, Jr., filed by Mr. Cushing in *Mauran* v. *Insurance Co.*, 6 Wall. 1, the words were "doubtless originally inserted with the view of enumerating all possible forms of government, monarchical, aristocratical, and democratic."

The British Foreign Enlistment Act, 59 Geo. III. c. 69, was bottomed on the act of 1818, and the seventh section, the opening portion of which corresponded to the third section of that act. Its terms were, however, considerably broader and left less to construction. But we think the words "colony, district, or people" must be treated as equally comprehensive in their bearing here.

In the case of *The Salvador*, L. R. 3 P. C. 218, the *Salvador* had been seized under warrant of the governor of the Bahama Islands and proceeded against in the Vice-Admiralty Court there for breach of that section, and was, upon the hearing of the cause, ordered to be restored, the court not being satisfied that the vessel was engaged, within the meaning of the section, in aiding parties in insurrection against a foreign government, as such parties did not assume to exercise the powers of government over any portion of the territory of such government. This decision was overruled on appeal by the Judicial Committee of the Privy Council, and Lord Cairns, delivering the opinion, said: "It is to be observed that this part of the section is in the alternative. The ship may be employed in the service of a foreign prince, state, or potentate, or foreign state, colony, province, or part of any province or people; that is to say, if you find any consolidated body in the foreign state, whether it be the potentate, who has the absolute dominion, or the government, or a part of the province, or of the people, or the whole of the province or the people acting for themselves, that is sufficient. But by way of alternative it is suggested that there

may be a case where, although you cannot say that the province, or the people, or a part of the province or people are employing the ship, there yet may be some person or persons who may be exercising, or assuming to exercise, powers of government in the foreign colony or state, drawing the whole of the material aid for the hostile proceedings from abroad; and, therefore, by way of alternative, it is stated to be sufficient, if you find the ship prepared or acting in the service of 'any person or persons exercising, or assuming to exercise, any powers of government in or over any foreign state, colony, province, or part of any province or people;' but that alternative need not be resorted to, if you find the ship is fitted out and armed for the purpose of being 'employed in the service of any foreign state or people, or part of any province or people.' * * *

"It may be (it is not necessary to decide whether it is or not) that you could not state who were the person or persons, or that there were any person or persons exercising, or assuming to exercise, powers of government in Cuba, in opposition to the Spanish authorities. That may be so; their lordships express no opinion upon that subject, but they will assume that there might be a difficulty in bringing the case within that second alternative of the section, but their lordships are clearly of opinion that there is no difficulty in bringing the case under the first alternative of the section, because their lordships find these propositions established beyond all doubt, — there was an insurrection in the island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these insurgents, beyond all doubt, formed part of the province or people of Cuba; and beyond all doubt the ship in question was to be employed, and was employed, in connection with and in the service of this body of insurgents."

We regard these observations as entirely apposite, and while the word "people" may mean the entire body of the inhabitants of a state; or the state or nation collectively in its political capacity; or the ruling power of the country; its meaning in this branch of the section, taken in connection with the words "colony" and "district," covers in our judgment any insurgent or insurrectionary "body of people acting together, undertaking and conducting hostilities," although its belligerency has not been recognized. Nor is this view otherwise than confirmed by the use made of the same words in the succeeding part of the sentence, for they are there employed in another connection, that is, in relation to the cruising, or the commission of hostilities, "against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace;" and, as thus used, are affected by obviously different considera-

tions. If the necessity of recognition in respect of the objects of hostilities, by sea or land, were conceded, that would not involve the concession of such necessity in respect of those for whose service the vessel is fitted out.

Any other conclusion rests on the unreasonable assumption that the act is to remain ineffectual unless the government incurs the restraints and liabilities incident to an acknowledgment of belligerency. On the one hand, pecuniary demands, reprisals, or even war, may be the consequence of failure in the performance of obligations towards a friendly power, while on the other, the recognition of belligerency involves the rights of blockade, visitation, search, and seizure of contraband articles on the high seas, and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare.

No intention to circumscribe the means of avoiding the one by imposing as a condition the acceptance of the contingencies of the other can be imputed.

Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations, recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. The *Ambrose Light*, 25 Fed. Rep. 408; 3 Whart. Dig. Int. Law, § 381; and authorities cited.[1]

[1] Treat, J. (in *U. S.* v. *One Hundred Barrels*, 1862, 27 Fed. Cas. 292, 297), said in speaking of results flowing from recognition of belligerency of Southern States: "The position of foreign nations with respect to this insurrection * * * does not determine its status in American courts. The latter follow exclusively the decision of the political department of the United States Government on that question. Even if other nations had recognized the so-called Confederate Government as an independent power, their recognition would bind themselves and their subjects alone — not the United States. Those foreign nations which have recognized a state of belligerency, and assumed the position of neutrals, estop their subjects from disputing the lawfulness of captures on the high seas according to the laws of maritime warfare. The ships and cargoes of their subjects are to be judged accordingly. But rebel property thus captured is amenable to municipal authority. * * * In the adjudication of all such questions arising here, the United States statutes would furnish the rules of decision. In other words, as to all foreign nations, the United States Government is absolutely sovereign within its own territorial limits, and over its own subjects. Its internal constitution is a subject with which foreign powers have no right to intermeddle. The equality and independence of nations could not otherwise exist. However much the great powers of Europe have, in time past, violated that rule, they have so far recognized its rightfulness, as to offer always in excuse for their violations of it, some real or supposed emergency, which they claimed worked a legitimate exception to its otherwise universal application — thus doing homage to the principle even when practically assailing it."

Belligerency is a fact; when this fact exists, it not only may but should be

But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed.

The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred.

On June 12, 1895, a formal proclamation was issued by the President and countersigned by the Secretary of State, informing the people of the United States that the island of Cuba was "the seat of serious civil disturbances accompanied by armed resistance to the authority of the established government of Spain, a power with which

recognized. To "recognize" that which does not exist, is practically speaking to help to create it, and bring it into existence. Such action would be, to put it mildly, the manifestation of an unfriendly feeling which amounts to little less than intervention.

As to the exact period when recognition of belligerency is permissible, see President Grant's Seventh Annual Message of Dec. 7, 1875 (7 Richardson's Messages & Papers, 336–340), refusing to recognize the "existence of war" in Cuba. "Unless justified by necessity," he says, "it is always, and justly, regarded as an unfriendly act and a gratuitous demonstration of moral support to the rebellion. It is necessary, and it is required, when the interests and rights of another government or of its people are so far affected by a pending civil conflict as to require a definition of its relations to the parties thereto. But this conflict must be one which will be recognized in the sense of international law as war. Belligerence, too, is a fact, the mere existence of contending armed bodies and their occasional conflicts do not constitute war in the sense referred to. * * * Such recognition entails upon the country according the rights which flow from it difficult and complicated duties, and requires the exaction from the contending parties of the strict observance of their rights and obligations. It confers the right of search upon the high seas by vessels of both parties; it would subject the carrying of arms and munitions of war, which now may be freely transported, freely and without interruption, in the vessels of the United States to detention and possible seizure; it would give rise to countless vexatious questions, would release the parent government from responsibility for acts done by the insurgents, and would invest Spain with the right to exercise the supervision recognized by our treaty of 1795 over our commerce on the high seas, a very large part of which, in its traffic between the Atlantic and the Gulf States and between all of them and the States on the Pacific, passes through the waters which wash the shores of Cuba."

It will not be questioned that General Grant knew what war really was; his statement of the rights flowing from it is equally clear, concise, and correct. It will be remembered that the late President McKinley quoted this passage at length in his first Annual Message, December 6, 1897 (10 Richardson, id. 132–133). Reference should be made to Dana's note 15 to p. 34 of his edition of Wheaton. It is not too much to say that this foot-note states the doctrine of international law on this vexed subject in a way which bids fair to render it a classic. — Ed.

the United States are and desire to remain on terms of peace and amity;" declaring that "the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established government, by accepting or exercising commissions for war-like service against it, by enlistment or procuring others to enlist for such service, by fitting out, or arming, or procuring to be fitted out and armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such government;" and admonishing all such citizens and other persons to abstain from any violation of these laws.

In his annual message of December 2, 1895, the President said: "Cuba is again gravely disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations of the coast. Besides deranging of the commercial exchanges of the island, of which our country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this government to enforce obedience to our neutrality laws, and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty.

"Whatever may be the traditional sympathy of our countrymen as individuals with a people who seem to be struggling for larger autonomy and greater freedom, deepened as such sympathy naturally must be in behalf of our neighbors, yet the plain duty of their government is to observe in good faith the recognized obligations of international relationship. The performance of this duty should not be made more difficult by a disregard on the part of our citizens of the obligations growing out of their allegiance to their country, which should restrain them from violating as individuals the neutrality which the nation of which they are members is bound to observe in its relations to friendly sovereign states. Though neither the warmth of our people's sympathy with the Cuban insurgents, nor our loss and material damage consequent upon the futile endeavors thus far made to restore peace and order, nor any shock our humane sensibilities may have received from the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the government to honestly fulfil every international obligation,

yet it is to be earnestly hoped, on every ground, that the devastation of armed conflict may speedily be stayed, and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits."

July 27, 1896, a further proclamation was promulgated, and in the annual message of December 7, 1896, the President called attention to the fact that "the insurrection in Cuba still continues with all its perplexities," and gave an extended review of the situation.

We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it cannot be doubted that, this being so, the act in question is applicable.

We see no justification for importing into section 5283 words which it does not contain and which would make its operation depend upon the recognition of belligerency; and while the libel might have been drawn with somewhat greater precision, we are of opinion that it should not have been dismissed.

Decree reversed.

Section 42. — Contraband of War.

THE "PETERHOFF."

Supreme Court of the United States, 1866.

(5 *Wallace*, 28, 58.)

Mr. Chief Justice Chase:[1] —

"The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes.

"Merchandise of the first class, destined to a belligerent country

[1] Facts omitted and only that part of the opinion is given relating to contraband and its classification. — Ed.

or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

"A considerable portion of the cargo of the *Peterhoff* was of the third class, and need not be further referred to.

"A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot therefore be treated as contraband. Another portion was, in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness, and of articles described in the invoices as 'men's army bluchers,' 'artillery boots,' and 'government regulation gray blankets.' These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army.

"It is true that even these goods, if really intended for sale in the market of Matamoras, would be free of liability; for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

"And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not.

"The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband and articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a state in rebellion, or for the use of the rebel military forces, were liable to capture, though primarily destined to Matamoras.

"We are obliged to conclude that the portion of the cargo which we have characterized as contraband must be condemned.

"And it is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor Kent, thus: 'Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the invoice of any particular article is not usually admitted, to exempt it from general confiscation.'

"So much of the cargo of the *Peterhoff*, therefore, as actually belonged to the owner of the artillery harness, and the other contraband goods, must be also condemned." [1]

THE "JONGE MARGARETHA."

HIGH COURT OF ADMIRALTY, 1799.

(1 *C. Robinson*, 189.)

This was a case of a Papenberg ship, taken on a voyage from Amsterdam to Brest with a cargo of cheese, April, 1797.

Judgment,—Sir W. SCOTT:—

"There is little reason to doubt the property in this case, and therefore passing over the observations which have been made on that part of the subject, I shall confine myself to the single question: Is this a legal transaction in a neutral, being the transaction of a Papenberg ship carrying Dutch cheese from Amsterdam to Brest, or Morlaix (it is said), but certainly to Brest; or, as it may be otherwise described, the transaction of a neutral carrying a cargo of provisions, not the product and manufacture of his own country, but of the enemy's ally in the war—of provisions which are a capital ship's store—and to the great port of naval equipment of the enemy.

"If I adverted to the state of Brest at this time, it might be no unfair addition to the terms of the description, if I noticed, what was notorious to all Europe at this time, that there was in that port

[1] For the Proclamation of Charles I., 1625, on contraband and the various articles enumerated and designated as such, see Robinson's Collectanea Maritima, 54.

In the civil war coin and bullion, etc., were considered contraband. *U. S.* v. *Dickelman*, 1875, 92 U. S. 520; likewise cotton. *Mrs. Alexander's Cotton*, 1864, 2 Wall. 404.

That a submarine cable and vessel employed in laying it may, for a belligerent under certain circumstances, partake of the nature of contraband, see *The International*, 1871, L. R., 3 Adm. & Ecc. 321 at 336; Goffin, Submarine Cables in Time of War, 15 Law Quarterly Rev., 145–154; Liszt, 327; 25 Journal de Droit Int. Privé, 648–652, 699–701. — ED.

a considerable French fleet in a state of preparation for sallying forth on a hostile expedition; its motions at that time were watched with great anxiety by a British fleet which lay off the harbor for the purpose of defeating its designs. Is the carriage of such a supply to such a place, and on such an occasion, a traffic so purely neutral as to subject the neutral trader to no inconvenience?

"If it could be laid down as a general position, in the manner in which it has been argued, that cheese being a provision is universally contraband, the question would be readily answered: but the court lays down no such position. The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations; owing to particular circumstances, the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir R. Wiseman, the King's advocate, upon a formal reference made to him, that by the practice of the English Admiralty, corn, wine, and oil were liable to be deemed contraband. 'I do agree,' says he, reprobating the regulations that had been published, and observing that rules are not to be so hardly laid down as to press upon neutrals, 'that corn, wine, and oil will be deemed contraband.'

"These articles of provisions then were at that time confiscable, according to the judgment of a person of great knowledge and experience in the practice of this court. In much later times many other sorts of provisions have been condemned as contraband. In 1747, in the *Jonge Andreas*, butter, going to Rochelle, was condemned. How it happened that cheese at the same time was more favourably considered, according to the case cited by Dr. Swabey, I don't exactly know. The distinction appears nice. In all probability the cheeses were not of the species which is intended for ship's use. Salted cod and salmon were condemned in the *Jonge Frederick*, going to Rochelle, in the same year. In 1748, in the *Joannes*, rice and salted herrings were condemned as contraband. These instances show that articles of human food have been so considered, at least where it was probable that they were intended for naval or military use.

"I am aware of the favourable positions laid down upon this matter by Wolfius and Vattel, and other writers of the continent, although Vattel expressly admits that provisions may, under certain circumstances, be treated as contraband. And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in

it. The court must therefore look to the circumstances under which this supply was sent.

"Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is, that they are of the growth of the country which exports them. In the present case they are the product of another country, and that a hostile country; and the claimant has not only gone out of his way for the supply of the enemy, but he has assisted the enemy's ally in the war by taking off his surplus commodities.

"Another circumstance to which some indulgence, by the practice of nations, is shown, is, when the articles are in their native and unmanufactured state. Thus, iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage, and wheat is not considered as so noxious a commodity as any of the final preparations of it for human use. In the present case, the article falls under this unfavourable consideration, being a manufacture prepared for immediate use.

"But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ship's use; or whether they were going with a highly probable destination to military use? Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test; if the port is a general commercial port it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. *Contra*, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed if at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.

"In the case of the *Eendraght*, cited for the claimant, the destination was to Bourdeaux; and though smaller vessels of war may be occasionally built and fitted out there, it is by no means a port of naval military equipment in its principal occupation, in the same manner as Brest is universally known to be.

"The court, however, was unwilling in the present case to conclude the claimant on the one point of destination, it being alleged that the cheeses were not fit for naval use, but were merely luxuries for the use of domestic tables. It therefore permitted both parties to exhibit affidavits as to their nature and quality. The claimant has exhibited none; but here are authentic certificates from persons of integrity and knowledge that they are exactly such cheeses as are used in British ships when foreign cheeses are used at all, and that they are exclusively used in French ships of war.

"Attending to all these circumstances, I think myself warranted to pronounce these cheeses to be contraband, and condemn them as

As such, however, the party has acted without dissimulation in the case, and may have been misled by an inattention to circumstances, to which in strictness he ought to have adverted, as well as by something like an irregular indulgence on which he has relied; I shall content myself with pronouncing the cargo to be contraband without enforcing the usual penalty of the confiscation of the ship belonging to the same proprietor."[1]

THE "COMMERCEN."

Supreme Court of the United States, 1816.

(1 *Wheaton*, 382.)

This was the case of a Swedish vessel captured on the 16th of April, 1814, by the private armed schooner *Lawrence*, on a voyage from Limerick, in Ireland, to Bilboa, in Spain. The cargo consisted of barley and oats, the property of British subjects, the exportation of which is generally prohibited by the British Government; and, as well by the official papers of the custom-house as by the private letters of the shippers, it appears to have been shipped under the special permission of the government for the sole use of his Britannic Majesty's forces then in Spain.

Story, J.: — The single point now in controversy in this cause is, whether the ship is entitled to the freight for the voyage. The general rule that the neutral carrier of enemy's property is entitled to his

[1] See to the same effect: *The Frau Margaretha*, 1805, 6 C. Rob. 92; *The Zelden Rust*, 1805, 6 C. Rob. 93; *The Ranger*, 1805, 6 C. Rob. 125 (ship's biscuit condemned); *The Edward*, 1801, 4 C. Rob. 68.

"To escape from the contagion of contraband, the innocent articles must be the property of a different owner," per Sir Wm. Scott, in *The Staat Embden*, 1798, 1 C. Rob. 31. — Ed.

freight, is now too firmly established to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests have been held to affect the neutral with the forfeiture of freight, and in cases of a more flagrant character, such as carrying despatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted. By the modern law of nations, provisions are not, in general, deemed contraband, but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. If destined for the ordinary use of life in the enemy's country they are not, in general contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.[1]

[1] Provisions. — In the case of *Maissonnaire* v. *Keating*, 1815, 2 Gallison, the question was as to the validity of a Russian document, in which the legality of the capture had to be passed upon. It was the case of a cargo of provisions; and the court held that provisions going to a port of naval equipment of the enemy, and *a fortiori*, if destined for the supply of his army, became contraband, and subjected the vessel (probably belonging to owner of cargo) and cargo to confiscation by the other belligerent.

Res ancipitis usus. — As to the question: what articles shall be regarded as contraband of war? there has been, and still is, a wide difference of opinion. The English prize courts, as shown by the cases given, have treated provisions as contraband in certain circumstances; and the American courts followed this practice. The French decrees and decisions, on the other hand, have taken the opposite view, that provisions are in no case to be treated as contraband. And yet, in 1885, the French Government announced that it proposed to treat rice bound for open Chinese ports as contraband of war.

As to other articles *ancipitis usus*, those most in controversy have been naval stores, including in that term everything used in the construction of ships of war. The cases in which these articles have been confiscated by the English prize courts are very numerous. A few of the leading cases are as follows:

The Staat Embden, 1798, 1 C. Rob. 26 (masts); *The Endraught*, 1798, 1 C. Rob. 22 (timber); *The Jonge Tobias*, 1799, 1 C. Rob. 329 (tar); *The Sarah Christina*, 1799, 1 C. Rob. 237, 241 (tar and pitch); *The Ringende Jacob*, 1798, 1 C. Rob. 89 (hemp, iron bars); *The Neptunus*, 1800, 3 C. Rob. 108 (sail-cloth).

The greater number of these articles were treated by Sir William Scott as goods absolutely contraband, if going to an enemy's port, without considering the nature of the port. The government of the United States, in 1797, held the same view: "Ship timber and naval stores," said the Secretary of State, "are by the law of nations con-

THE "NEUTRALITET."

High Court of Admiralty, 1801.

(3 *C. Robinson*, 295.)

This was a case of a Danish ship taken with a cargo on a voyage from Archangel to Dordrecht. The ship had been a Dutch vessel, and was asserted to have been purchased by Mr. Schultz, of Altona. She then went from Holland to Altona, and was from thence sent on to Archangel, to carry a cargo to Dordrecht, under a charter party made by the asserted owner.

Judgment,—Sir W. Scott:—

"The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband articles.

"The ancient practice was otherwise, and it cannot be denied, that it was perfectly defensible on every principle of justice. If to

traband of war." It will be seen by the French cases *la Minerve* and others, that the French practice is the reverse of that of England and the United States.

The recent changes in naval warfare, brought about by the introduction of steam power and steel ships, have introduced a large number of new articles into the list of contraband or "occasional contraband" goods. This may be seen in Mr. G. Lushington's "Manual of Naval Prize Law" (edition of 1866), in which goods absolutely contraband are enumerated as follows:—

"Arms of all kinds and machinery for manufacturing arms. Ammunition and materials for ammunition, including lead, sulphate of potash, muriate of potash, chlorate of potash, and nitrate of soda. Gunpowder and its materials, saltpetre and brimstone; also gun-cotton.

"Military equipments and clothing. Military stores.

"Naval stores, such as masts, spars, rudders, and ship timber, hemp and cordage, sail-cloth, pitch, and tar; copper fit for sheathing vessels; marine engines, and the component parts thereof, including screw-propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler-plates, fire-bars; marine cement and the materials in the manufacture thereof, as blue-lias and Portland cement. Iron in any of the following forms: Anchors, rivet-iron, angle-iron, round bars from $\frac{3}{4}$ to $\frac{5}{8}$ of an inch diameter, rivets, strips of iron, sheet plate-iron exceeding $\frac{1}{4}$ of an inch, and low-moor and bowling plates."

Goods conditionally contraband comprise:

"Provisions and liquors fit for the consumption of army or navy; money; telegraph materials, such as wire, porous cups, platina, sulphuric acid, and zinc. Materials for the construction of a railway, as iron bars, sleepers, etc.

"Coals, hay, horses, rosin, tallow, timber."

France does not regard timber for the construction of ships as contraband of war. *Il Volante*, 1807, Le Conseil des Prises (1 Pistoye et Duverdy, 409); (*La Minerve*, id. 410.) For a recent discussion and the views of publicists of different nationalities, see 25 Journal de Droit Int. Privé, 285, 441, 467, 493, 515, 535, 624, 652, 828, 1006, 1018. — Ed.

supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has however introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act. But this rule is liable to exceptions: Where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one. The circumstances of the present case compose a case of exception also; for it is a case of singular misconduct on the part of the asserted ship owners. They are subjects of Denmark, and as such are under the peculiar obligations of a treaty not to carry goods of this nature for the use of the enemies of Great Britain.

"A reference has been made to ancient cases of Dantzick ships, which were restored, though taken carrying masts to Cadiz. The particulars of those cases are not very exactly stated; but they were clearly the cases of proprietors exporting the produce of their own territory, or of neighboring ports, without the breach of any obligation but such as the general law of nations imposed.

"In this instance the ship was freighted at Altona, to go to Archangel, for the purpose of carrying a cargo of tar to Holland, which is a commerce expressly prohibited by the Danish treaty. Tar is an article which a Danish ship cannot lawfully carry to an enemy's port, even when it is the produce and manufacture of Denmark. This ship goes to a foreign port, to effect that which she is prohibited from doing, even for the produce of her own country; in this respect, throwing off the character of a Danish ship by violating the treaties of her country; and all this is done with the full privity of the asserted owner, who is the person entering into the charter party. In such a case as the present, the known ground on which the relaxation was introduced, the supposition that freights of noxious or doubtful articles might be taken, without the personal knowledge of the owner, entirely fails; and the active guilt of the parties is aggravated by the circumstances, of its being a criminal traffic in foreign commodities, and in breach of explicit and special obligations. The confiscation of a ship so engaged will leave the general rule still untouched, that the carriage of contraband works a forfeiture of freight and expenses, but not of the ship.

"Ship condemned."

CARRINGTON AND OTHERS v. THE MERCHANTS' INSURANCE COMPANY.

SUPREME COURT OF THE UNITED STATES, 1834.

(8 *Peters*, 495.)

In 1824 a policy of insurance for $10,000 was effected on the cargo of the *General Carrington*. At the commencement of the voyage, and until the final loss of the ship, open hostilities existed between Spain and the new governments or states of Chili and Peru. From the orders it was apparent that the object of the voyage was to sell the cargo in Chili and Peru. The ship was to proceed direct for Valparaiso, and was to enter that port under the plea of a want of water. Some portion of the cargo was expected to be sold at that port; thence the ship was to proceed along the coast of Chili and Peru for the purpose of trade. There was no allegation that the underwriters were not well acquainted with the nature and objects of the voyage. While lying at anchor in Quilca, Peru, the vessel was seized by Spanish authorities.

The policy was against the usual perils, and contained the following clause: "It is also agreed that the insurers shall not be answerable for any charge, damage, or loss which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war." [1]

Mr. Justice STORY delivered the opinion of the court: [2] —

This cause comes before the court upon a certificate of a division of opinion of the judges of the Circuit Court for the district of Massachusetts.

Upon the trial of the cause upon the evidence, the parties propounded certain questions, upon which the Circuit Court (with the assent of the parties), certified a division of opinion, for the purpose of obtaining the final decision of this court in regard to them.

The first is, whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause. The question here propounded is not whether there must be a legal or justifiable cause for condemnation; but simply, whether there must not be such cause for the seizure and detention. And we are of opinion that the question ought to be

[1] The statement of the case is abbreviated. — ED.

[2] That part of the opinion dealing with "the fourth and fifth questions" is omitted. — ED.

answered in the affirmative. The language of the exception, when properly construed, leads to this conclusion; and it is confirmed by authorities standing upon analogous clauses. The language is, "the assurers shall not be liable for any charge, damage, or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war." It is not, then, every seizure or detention which is excepted; but such only as is made for, and on account, of a particular trade. A seizure or detention, which is a mere act of lawless violence, wholly unconnected with any supposed illicit or contraband trade, is not within the terms or spirit of the exception. And as little is a seizure or detention not *bona fide* made upon a just suspicion of illicit or contraband trade, but the latter used as a mere pretext or color for an act of lawless violence; for under such circumstances it can in no just sense be said to be made for or on account of such trade. It is a mere fraud to cover a wanton trespass; a pretence and not a cause for the tort. To bring a case, then, within the exception, the seizure or detention must be *bona fide*, and upon a reasonable ground. If there has not been an actual illicit or contraband trade, there must at least be a well-founded suspicion of it, a probable cause to impute guilt, and justify further proceedings and inquiries; and this is what the law deems a legal and justifiable cause for the seizure or detention. The general words of the policy cover the risks of restraints and detainments of all kings, princes, and people. The exception withdraws from it such as are *bona fide* made for, and on account of illicit or contraband trade. So that, upon the mere terms of the exception there would not seem any real ground for doubt. But if there were, the next succeeding clause associated with it demonstrates that such must have been the understanding of the parties. It is there said that the judgment of a foreign consular or colonial court shall not be conclusive upon the parties as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations. Now, if a mere lawless seizure or detention, under the pretext of illicit and contraband trade, were within the exception, the inquiry, whether there had been contraband articles on board, or an attempt of illicit trade, would be in most, if not in all cases, wholly unimportant and nugatory to the assured, for whose benefit the clause is introduced; since the sentence would always establish a pretence for the seizure and detention, although not a justifiable cause for it. The reasonable interpretation of the clause must be that it was introduced to enable the assured to disprove the existence of justifiable cause for the seizure or detention, by showing that the facts did not warrant it.

We think that the authorities cited at the bar lead to the same

conclusion. In *Church* v. *Hubbard*, 2 Cranch, 187, 2 Cond. Rep. 385; where the exception was, "that the insurers do not take the risk of illicit trade with the Portuguese, and the insurers are not liable for seizure by the Portuguese for illicit trade;" the main question was, whether an attempt to trade, not consummated by actual trading, was within the exception. The court held that it was. On that occasion the chief justice said, "no seizure, not justifiable under the laws and regulations established by the Crown of Portugal for the restriction of foreign commerce with its dependencies, can come within this part of this contract; and every seizure which is justifiable by those laws and regulations must be deemed within it." And applying this language to the circumstances of the present case, we may add, that no seizure or detention not justifiable by the law of nations can come within the present exception, and every seizure which is justifiable by the law of nations must be deemed within it. The cases of *Smith* v. *The Delaware Insurance Company*, 3 Serg. and Rawle, 74; and *Fandel* v. *The Phœnix Insurance Company*, 4 Serg. and Rawle, 29; *Johnston and Weir* v. *Ludlow*, 1 Caines's Cas. in Error, 29; s. c. 2 Johns. Cas. 481. See also *Laing* v. *United Insurance Company*, 2 Johns. Cas. 174; s. c. 2 Johns. Cas. 487; *Tucker* v. *Juhel*, 1 Johns. R. 20, adopt a similar doctrine, if they do not proceed beyond it. The case of *Higginson* v. *Pomroy*, 11 Mass. R. 104, contained an exception of "illicit trade with the Spaniards;" and the court held that the exception extended to every seizure and detention suggested by the prohibitions of trade and intercourse, as the means of enforcing them; and whether of prevention or of punishment for infraction; and that, therefore, it extended to cases where the charge of illicit trade with the Spaniards might be ultimately repelled; and where the property seized might be in consequence acquitted under the circumstances of the particular case. But this supposes that there was probable or justifiable cause for the seizure, *bona fide* existing; and the court explicitly assented to the general doctrine in *Church* v. *Hubbard*. It is true that the learned chief justice, in delivering the opinion of the court, added, that "*perhaps* (we may add), although not necessary to the present decision, even arbitrary acts of the Spanish colonial governments, if assumed to be justified on their parts by the prohibitions of trade and intercourse, are, we think, within the exception of seizure for illicit trade." This is professedly a mere dictum of the court; and giving it every reasonable force as authority, it proceeds on the supposition that such arbitrary acts are *bona fide* done, and are not mere pretexts to cover an illegal seizure.

The second question is, whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing

vessel to be such as the plaintiffs allege (that is to say, of an armed vessel fitted out and commissioned at Callao by Rodil), there was a legal and justifiable cause for the seizure of the *General Carrington* and her cargo. The third is precisely the same in terms, except taking the authority of the armed vessel to be such as the defendants allege (that is to say, to be an armed vessel sailing under the royal Spanish flag, and acting by the royal authority of Spain).

Both these questions present the same general point, whether there was, under the circumstances of the case, a legal and justifiable cause for the seizure and detention of the ship and her cargo. The facts material to be taken into consideration in ascertaining this point are, that the ship, when seized, had not landed all her outward cargo, but was still in the progress of the outward voyage originally designated by the owners; that she sailed on that voyage from Providence with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship; with a false destination and false papers, which yet accompanied the vessel; that the contraband articles had been landed before the policy, which is a policy on time, designating no particular voyage, had attached; that the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and that the alleged cause of the seizure and detention was the trade in articles contraband of war by the landing of the powder and muskets already mentioned.

If by the principles of the law of nations there existed under these circumstances a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods; then the questions must be answered in the affirmative, that there was a legal and justifiable cause.

According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy subjects them, if captured, *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter only when there has been some actual co-operation on their part in a meditated fraud upon the belligerents; by covering up the voyage under false papers and with a false destination. This is the general doctrine when the capture is made *in transitu*, while the contraband goods are yet on board. But when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the

return voyage, although the latter may be the proceeds of the contraband. And the same rule would seem by analogy to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established that it exists only in favor of neutrals who conduct themselves with fairness and good faith in the arrangements of the voyage. If, with a view to practice a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers, and with a false destination, the mere deposit of the contraband in the course of the voyage is not allowed to purge away the guilt of the fraudulent conduct of the neutral. In the case of *The Franklin*, in 1801, 3 Rob. 217, Lord Stowell said, "I have deliberated upon this case and desire it to be considered as the settled rule of law received by this court, that the carriage of contraband with a false destination will make a condemnation of the ship, as well as the cargo." Shortly afterwards, in the case of *The Neutralitet*, 1801, 3 Rob. R. 295, he added, "The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband goods. The ancient practice was otherwise; and it cannot be denied that it was perfectly justifiable in principle. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in affecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscated for that act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient rule." The cases in which this language was used were cases of capture upon the outward voyage. See also *The Edward*, 4 Rob. R. 68. The same doctrine was afterwards held by the same learned judge to apply to cases where the vessel had sailed with false papers, and a false destination upon the outward voyage, and was captured on the return voyage. See *The Nancy*, 3 Rob. 122; *The Christianberg*, 6 Rob. 376. And finally in the cases of *The Rosalie* and *The Elizabeth*, in 1802, 4 Rob. R., note to table of cases, the lords of appeal in prize cases held that the carriage of contraband outward with false papers will affect the return cargo with condemnation. These cases are not

reported at large. But in the case of *The Baltic*, 1 Acton's R. 25, and that of *The Margaret*, 1 Acton's R. 333, the lords of appeal deliberately reaffirmed the same doctrine. In the latter case Sir William Grant, in pronouncing the judgment of the courts said, "The principle upon which this and other prize courts have generally proceeded to adjudication in cases of this nature (that is, where there are false papers), appears simply to be this: that if a vessel carried contraband on the outward voyage she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband. Hence we must pronounce against this appeal; the sentence (of condemnation) of the court below being perfectly valid and consistent with the acknowledged principles of general law."

We cannot but consider these decisions as very high evidence of the law of nations, as actually administered; and in their actual application to the circumstances of the present case, they are not, in our judgment, controlled by any opposing authority. Upon principle, too, we trust, that there is great soundness in the doctrine, as a reasonable interpretation of the law of nations. The belligerent has a right to require a frank and *bona fide* conduct on the part of neutrals in the course of their commerce in times of war; and if the latter will make use of fraud, and false papers, to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. The taint of the fraud travels with the party and his offending instrument during the whole course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated. There are many analogous cases in the prize law where fraud is followed by similar penalties. Thus, if a neutral will cover up enemy's property under false papers, which also cover his own property, prize courts will not disentangle the one from the other, but condemn the whole as good prize. That doctrine was solemnly affirmed in this court in the case of *The St. Nicholas*, 1 Wheaton, 417, 3 Cond. Rep. 614.

Upon the whole, our opinion is, that the general question involved in the second and third questions, whether there was a legal and justifiable cause of capture under the circumstances of the present case, ought to be answered in the affirmative. The question as to the authority of the cruiser to seize, so far as it depends upon her commission, can only be answered in a general way. If she had a commission under the royal authority of Spain, she was beyond question entitled to make the seizure. If Rodil had due authority to grant the commission the same result would arise. If he had no such

authority, then she must be treated as a non-commissioned cruiser, entitled to seize for the benefit of the Crown; whose acts, if adopted and acknowledged by the Crown or its competent authorities, become equally binding. Nothing is better settled both in England and America than the doctrine that a non-commissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a *droit* of the government. *The Amiable Isabella*, 6 Wheat. Rep. 1, 5 Cond. Rep. 1; *The Dos Hermanos*, 10 Wheat. Rep. 306, 6 Cond. Rep. 109; *The Melomane*, 5 Rob. 41; *The Elsebe*, 5 Rob. 174; *The Maria Françoise*, 6 Rob. 282.

The sixth and last question is whether, supposing the ship to have traded in articles contraband of war in the ports of Chili, and to have been seized afterwards in a port of Peru, then under the royal authority, before she had discharged her outward cargo for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular. This question is understood to raise the point whether, if the seizure and detention be *bona fide* for and on account of illicit or contraband trade, a sentence of condemnation or acquittal, or other regular proceedings to adjudication, are necessary to discharge the underwriters. We are of opinion that they are not. If the seizure or detention be lawfully made for or on account of illicit or contraband trade, all charges, damages, and losses consequent thereon, are within the scope of the exception. They are properly attributable to such seizure and detention as the primary cause, and relate back thereto. If the underwriters be discharged from the primary hostile act, they are discharged from the consequences of it. The whole reasoning in *Church* v. *Hubbard*, 2 Cranch, 187, presupposes that if the underwriters be exempted from the risk of a justifiable seizure for illicit trade, they are not accountable for losses consequent thereon, whether arising from a sentence of condemnation or otherwise.[1]

[1] This consequence does not attach unless false papers have been used. "The doctrine of these cases is not approved of by Wheaton or by foreign jurists; and, while undoubtedly severe, it does not appear to be a necessary deduction from the general principles governing the forfeiture of contraband cargoes." Hall, Int. Law, p. 696. But see 1 Duer, Marine Ins., 627, note c.

In *The Sarah Christiana*, 1799, 1 C. Rob. 238, 241, Sir Wm. Scott said: "In the practice of this court there is a relaxation of these articles (pitch and tar), *being the produce of the claimant's country*; and it has been deemed a harsh exercise of a belligerent right to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce. But in the same practice this relaxation is understood with a condition, that it may be brought in, not for confiscation, but for pre-emption; no unfair compromise, as it should seem, between the belligerent's rights, founded on the necessities of self-defence, and the claims of the neutral to

THE "IMINA."

High Court of Admiralty, 1800.

(3 *C. Robinson*, 138.)

This was a case of a cargo of ship timber which had sailed July, 1798, from Dantzick, originally for Amsterdam, but, was going at the time of capture to Embden, in consequence of information of the blockade of Amsterdam.

Judgment. — Sir W. Scott: — This is a claim for a ship taken, as it is admitted, at the time of capture sailing for Embden, a neutral port; a destination on which, if it is considered as the real destination, no question of contraband could arise; inasmuch as goods going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful. It is contended, however, that they are of such a nature as to become contraband if taken on a destination to a hostile port. On this point, some difference of opinion seems to have been entertained; and the papers which are brought in may be said to leave this important fact in some doubt. Taking it,

export his native commodities though immediately subservient to the purposes of hostility. To entitle the party to the benefit of this rule a perfect *bona fides* on his part is required."

On *The Haabet*, 1800, 2 C. Rob. 175 at p. 182, the same eminent judge said: "It is a mitigated exercise of war on which any purchase is made, and no rule has established, that such a purchase shall be regulated exactly upon the same terms of profit which would have followed the adventure, if no such exercise of war had intervened; it is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter, and the expenses which he has incurred. * * * But certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors, for these are unjust captures, but authorized exercises of the right of war." See further, *The Staat Embden*, 1798, 1 C. Rob. 27; *The Ringende Jacob*, 1798, 1 C. Rob. 89; *The Maria*, 1799, 1 C. Rob. 340; *The Apollo*, 1802, 4 C. Rob. 159; *The Christina Maria*, 1802, 4 C. Rob. 166; *The Twee Juffrowen*, 1802, 4 C. Rob. 242; *The Evert*, 1803, 4 C. Rob. 354.

"In strictness," says Hall (Int. Law, 690-691), "every article which is either necessarily contraband, or which has become so from the special circumstances of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter class to pre-emption only, which by the English practice means purchase of the merchandise at its mercantile value, together with a reasonable profit, usually calculated at ten per cent on the amount. This mitigation of extreme belligerent privilege is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband." — Ed.

however, that they are of such a nature as to be liable to be considered as contraband on a hostile distination, I cannot fix that character on them in the present voyage. The rule respecting contraband, as I have always understood it, is that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations, you cannot generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait till the goods are actually endeavoring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach.

Some argument has been drawn in this case from the conduct of the owners. It is said, "That they did not consider these articles as contraband; they were sent openly and without suppression or disguise;" perhaps that alone would not avail them. It appears, however, that Amsterdam was declared by this country to be in a state of blockade, a circumstance that would make it peculiarly criminal to attempt to carry a cargo of this nature to that port. The master receives information of this fact at Elsineur, and on consultation with the consul of the nation to which the cargo belonged, changed his purpose, and actually shaped his course for Embden, to which place he was sailing at the time of capture. I must ask then, was this property taken under such circumstances as make it subject to the penalty of contraband? Was it taken *in delicto*, in the prosecution of an intention of landing it at a hostile part? Clearly not. But it is said, that in the understanding and intention of the owner it was going to a hostile port; and that the intention on his part was complete, from the moment when the ship sailed on that destination; had it been taken at any period previous to the actual variation, there could be no question but that this intention would have been sufficient to subject the property to confiscation; but when the variation had actually taken place, however arising, the fact no longer existed. There is no *corpus delicti* existing at the time of capture. In this point of view I think the case is very distinguishable from some other cases in which, on the subject of deviation by the master into a blockaded port, the court did not hold the cargo to be necessarily involved in the consequences of that act. It is argued that as the criminal deviation of the master did not there immediately implicate the cargo; so here the favorable alteration cannot protect it, and that the offence must in both instances be judged by the act and designs of the owner. But in those cases there was the guilty act, really existing at the time of capture; both the ship and cargo were taken *in delicto;* and the only

question was to whom the *delictum* was to be imputed; if it was merely the offence of the master, it might bind the owner of the ship, whose agent he was; but the court held that it would be hard to bind the owners of the cargo by acts of the master, who is not *de jure* their agent, unless so specially constituted by them. In the present instance, there is no existing *delictum*. In those cases the criminal appearance, which did exist, was purged away by considering the owners of the cargo not to be necessarily responsible for the act of the master; but here there is nothing requiring any explanation: The cargo is taken on a voyage to a neutral port. To say that it is nevertheless exposed to condemnation on account of the original destination, as it stood in the mind of the owners, would be carrying the penalty of contraband further than it has been ever carried by this or the Superior Court. If the capture had been made a day before, that is, before the alteration of the course, it might have been different; but however the variation has happened, I am disposed to hold that the parties are entitled to the benefit of it; and that under that variation the question of contraband does not at all arise. I shall decree restitution; but as it was absolutely incumbent on the captors to bring the cause to adjudication from the circumstance of the apparent original destination, I think they are fairly entitled to their expenses.

Restitution. Captor's expenses decreed.[1]

SETON v. LOW.

Supreme Court of New York, 1799.

(1 *Johnson's Cases*, 1.)

This was an action on a policy of insurance, which included "all kinds of lawful goods and merchandises" on board the *Hannah*, &c.

The ship having been captured and a part of the goods condemned as contraband, the defendants refused to pay the insurance, on the ground that the plaintiffs had not informed them of the nature of the cargo.[2]

Kent, J.: — "Two question were raised on the argument in this case.

"1. Whether the contraband goods were lawful, within the meaning of the policy.

"2. If lawful, whether the assured were bound to disclose to the defendant the fact, that part of the cargo was contraband of war.

[1] See *The Trende Sostre*, 1800, cited in *The Lisette*, 6 C. Rob. 390 n., in which the same principle is held applicable to contraband. — Ed.

[2] Short statement substituted for that of the reporter and only a brief extract from the opinion is given. — Ed.

"On the first point, I am of opinion, that the contraband goods were lawful goods, and that whatever is not prohibited to be exported, by the positive law of the country, is lawful. It may be said, that the law of nations is part of the municipal law of the land, and that by that law (and which, so far as it concerns the present question, is expressly incorporated into our treaty of commerce with Great Britain) contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force, but the fact is, that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers; and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade; and yet, at the same time, from the law of necessity, as Vattel observes, the powers at war have a right to seize and confiscate the contraband goods, and this they may do from the principle of self-defence. The right of the hostile power to seize, this same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. They are rights which may, at times, reciprocally clash and injure each other. But this collision is the effect of inevitable necessity, and the neutral has no just cause to complain. A trade by a neutral in articles contraband of war is, therefore, a lawful trade, though a trade, from necessity, subject to inconvenience and loss." [1]

[1] In *Ex parte Chavasse*, in *Re Grazebrook*, 1865, 34, L. J. N. S., Bankruptcy, 17, Chavasse and Grazebrook went into partnership in the furnishing of contraband articles to the Confederacy. Both parties became bankrupt, and the assignees of Chavasse presented a petition to have the proceeds of these transactions apportioned, Chavasse never having received anything from them. This petition was dismissed with costs on the ground of the illegality of the contract. An appeal was allowed, Lord Chancellor Westbury considering that there was a valid partnership. He cites the *Santissima Trinidad*, 7 Wheat. 340, *ante*, and quotes the following passage as a very correct representation of the present state of the law of England: — "There is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."

He further said: "But this commerce, which was perfectly lawful for the neutral with either belligerent country before the war, is not made by the war unlawful or capable of being prohibited by both or either of the belligerents; and all that international law does is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined."

See also *The Helen*, 1855, L. R., 1 Adm. & Ecc. 1, *infra*, 821.

"The carrier of contraband may violate the proclamation of the neutral state of which he is a member and deprive himself of the right to protection from her, but the punishment of his offence is, by the general law of nations, left to the belligerent who

SECTION 43. — DESPATCHES AND PERSONS AS CONTRABAND.

THE "ATALANTA."

HIGH COURT OF ADMIRALTY, 1808.

(6 *C. Robinson*, 440.)

This was a case of a Bremen ship and cargo, captured on a voyage from Batavia to Bremen, on the 14th of July, 1797, having come last from the Isle of France; where a packet containing dispatches from the Government of the Isle of France to the Minister of Marine, at Paris, was taken on board by the master and one of the supercargoes, and was afterwards found concealed in the possession of the second supercargo, under circumstances detailed in the judgment.

Extract from judgment,—Sir W. SCOTT:—

"The question then is, what are the legal consequences attaching on such a criminal act?—for that it is criminal and most noxious is scarcely denied. What might be the consequences of a *simple* transmission of dispatches, I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a *fraudulent* case. That the simple carrying of dispatches, between the colonies and the mother country of the enemy, is a service highly injurious to the other Belligerent, is most obvious. In the present state of the world, in the hostilities of *European* powers, it is an object of great importance to preserve the connection between the mother country and her colonies; and to interrupt that connection, on the part of the other Belligerent, is one of the most energetic operations of war. The importance of keeping up that connection, for the concentration of troops, and for various military purposes, is manifest; and I may add, for the supply of civil assistance, also, and support, because the infliction of civil distress, for the purpose of compelling a surrender, forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the im-

has the right to capture. The offence is not cognizable by the municipal law of this country." Sir Robt. Phillimore in *The International*, 1871, 3 Adm. & Ecc. 321, 336.

The only penalty by the modern law of nations for carrying contraband is the loss of freight and expenses. *The Ringende Jacob*, 1798, 1 C. Rob., 89; *The Sarah Christina*, 1799, Id. 242, and others. See also 11 Op. Atty.-Gen. 408, 410; Id. 451.

On the subject of contraband generally, see the excellent and elaborate digest-note to *The Jonge Margaretha* in Tudor's Mercantile Cases, 3d ed., 986–1010. — ED.

portance of these dispatches might relate only to the civil wants of the colony, and that it is necessary to shew a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered in the contemplation of law, as an object of hostility, although not produced by operations strictly military. How is this intercourse with the mother country kept up, in time of peace? by ships of war or by packets in the service of the state. If a war intervenes and the other Belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does, in fact, place himself in the service of the enemy-state, and is justly to be considered in that character. Nor let it be supposed, that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of dispatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other Belligerent in that quarter of the world. It is true, as it has been said, that *one ball* might take off a *Charles* the XIIth, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that in the contemplation of human events it is a sort of evanescent quantity of which no account is taken; and the practice has been *accordingly*, that it is in considerable quantities only that the offence of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size, as not to be capable of producing the most important consequences in the operations of the enemy. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature.

"This country, which—however much its practice may be misrepresented by foreign writers, and sometimes by our own, has always administered the law of nations with lenity, adopts a more indulgent rule, inflicting on the ship only a forfeiture of freight in ordinary cases of contraband. But the offence of carrying dispatches is, it has been observed, greater. To talk of the confiscation of the noxious article, *the dispatches*, which constitutes the penalty in contraband, would be ridiculous. There would be *no* freight dependent on it, and therefore the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle.

Yangtsze Ins. Ass v Indemnity Mut Ins 1908. Am J Int Law Apr. 1909

"Then comes the other question, whether the penalty is not also to be extended further, to the cargo, being the property of the same proprietors—not merely *ob continentiam delicti*, but likewise because the representatives of the owners of the cargo, are directly involved in the knowledge and conduct of this guilty transaction? On the circumstances of the present case I have to observe, that the offence is as much the act of those who are the constituted agents of the cargo, as of the master, who is the agent of the ship. The general rule of law is, that, where a party has been guilty of an interposition in the war, and is taken *in delicto*, he is not entitled to the aid of the court, to obtain the restitution of any part of his property involved in the same transaction. It is said, that the term, 'interposition in the war' is a very general term and not to be loosely applied. I am of opinion, that this is an aggravated case of active interposition in the service of the enemy, concerted and continued in fraud, and marked with every species of malignant conduct. In such a case I feel myself bound, not only by the general rule, *ob continentiam delicti*, but by the direct participation of guilt in the agents of the cargo. Their own immediate conduct not only excludes all favourable distinction, but makes them pre-eminently the object of just punishment. The conclusion therefore is, that I must pronounce the ship and cargo subject to condemnation.

"The court observed afterwards:—I will mention, though it is a circumstance of no great consequence, that I have seen the dispatches in this case, and that they are of a noxious nature, stating the strength of the different regiments, &c., and other particulars entirely military."

THE "RAPID."

High Court of Admiralty, 1810.

(*Edwards*, 228.)

This was the case of an American ship which was captured on her voyage from New York to Tonningen, on suspicion of an intention to push into the *Texel*. But the question of destination being abandoned by the captors, they now contended that the case came within the principle laid down by the court in the case of the *Atalanta*, as it had been discovered, that among the papers given up by the master at the time of capture, there was a dispatch addressed to the Dutch colonial minister at the Hague, under cover to a commercial house at Tonningen.

Judgment,—Sir WILLIAM SCOTT:—

"The question of destination being disposed of, I have now only to consider what will be the legal effect of carrying these dispatches; and as it appears that the practice of conveying papers of this description, for the enemy, prevails to a considerable extent, I must take occasion to remind the proprietors of neutral vessels, that wherever it is indulged without sufficient caution, they will inevitably subject themselves to very grievous inconveniences. I should certainly be extremely unwilling to incur the imputation of imposing any restrictions upon the correspondence which neutral nations are entitled to maintain with the enemy, or, as it was suggested in argument, to lay down a rule which would in effect deter masters of vessels from receiving on board any private letters, as they cannot know what they may contain. But it must be understood, that where a party, from want of proper caution, suffers dispatches to be conveyed on board his vessel, the plea of ignorance will not avail him. His caution must be proportioned to the circumstances under which such papers are received. If he is taking his departure from a hostile port in a hostile country, and still more, if the letters which are brought to him are addressed to persons resident in an hostile country, he is called upon to exercise the utmost jealousy with regard to what papers he takes on board. On the other hand, it is to be observed, that where the commencement of the voyage is in a neutral country, and it is to terminate at a neutral port, or, as in this instance, at a port to which, though not neutral, an open trade is allowed, in such a case there is less to excite his vigilance, and, therefore, it may be proper to make some allowance for any imposition which may be practiced upon him. But when a neutral master receives papers on board in a hostile port, he receives them at his own hazard and cannot be heard to aver his ignorance of a fact which, by due enquiry, he might have made himself acquainted with. The party in the present case has the benefit of the favourable distinction: these papers, with some others, were put on board in an envelope, addressed to a person at Tonningen, who was instructed to forward them to Holland, but of this the master swears he knew nothing. They turn out to be of a public nature, conveying intelligence of importance to the government of the enemy at the Hague, and they begin, I observe, with an assertion which I hope is not true. The writer says: 'The letter and accompanying inclosures which I this day dispatch to His Excellency, the minister of the colonies, *via* Tonningen, will, I expect, be communicated to you. I trust my conduct will be approved of by His Excellency, and that he will please explain himself, both with

regard thereto, as also respecting the contents of my letter to the Marshal Daandels. The surest mode of correspondence, is by way of England or Paris, through the channel of the Dutch minister, as the American minister *will not refuse to inclose for him a letter to me in his dispatches.*' This, I hope, is rashly and injuriously said; the court cannot bring itself to believe, that the accredited minister of a country in amity with this would so far lend himself to the purposes of the enemy as to be the private instrument of conveying the dispatches of the enemy's government to their agent. The papers in question come from a person who seems to be invested with something of a public character, though of a peculiar kind, and they are upon public business, but I do not know whether they come strictly within the definition of dispatches. The writer of them had been sent to America from Batavia by the governor, to beat up for volunteers among the American merchants, in the hope of inducing them to embark themselves in the trade of that settlement. How far he had been acknowledged by the American government does not appear; from the contents of the papers themselves he seems to have been stationed in America, not by the government of Holland, but by the Dutch governor of Batavia, rather as a commercial agent to drive a bargain with individuals, and to induce them to join in these speculations for the relief of the Batavian trade, than for any purposes of a more diplomatic nature. His commission was such that it might exist without his being acknowledged as a public accredited minister by the American government, and therefore the claimant is, perhaps, entitled to the benefit of the distinction which has been taken, that these papers, though mischievous in their own nature, proceed from a person who is not clothed with any public official character. They came to the hands of this American master among a variety of other letters from private persons; they were concealed in an envelope, addressed to a private person, and were taken on board in a neutral country; these are circumstances which would rather induce the court to consider this case as excepted from the general rule which does not permit a neutral master, carrying dispatches for the enemy, to shelter himself under the plea of ignorance. In the present instance the American master denies all knowledge of the contents of these papers, and the benefit of that denial will extend to the cargo; it is not, therefore, a case in which the property is to be confiscated, although in this, as in every other instance in which the enemy's dispatches are found on board a vessel, he has justly subjected himself to all the inconveniences of seizure and detention and to all the expenses of those judicial inquiries which they have occasioned."

THE "MADISON."

High Court of Admiralty, 1810.

(*Edwards*, 224.)

Judgment. — Sir Wm. Scott:[1] —

"Now I am of opinion, that a communication from the Danish Government to its own consul in America, does not necessarily imply anything that is of a nature hostile or injurious to the interests of this country. It is not to be so presumed; such communications must be supposed to have reference to the business of the consul-general's office, which is to maintain the commercial relations of Denmark with America. If such communications were interdicted the functions of the official persons would cease altogether. * * *

"A Danish consul-general in America is not stationed there merely for the purpose of Danish trade, but of Danish-American trade; his functions relate to the joint commerce in which the two countries are engaged, and the case, therefore, falls within the principle which has been laid down in the case of the *Caroline* in regard to despatches from the enemy to his ambassador resident in a neutral country."

THE "OROZEMBO."

High Court of Admiralty, 1807.

(6 *C. Robinson*, 430.)

This was a case of an American vessel that had been ostensibly chartered by a merchant at Lisbon "to proceed in ballast to Macao, and there to take a cargo to America," but which had been afterwards, by his directions, fitted up for the reception of three military officers of distinction and two persons in civil departments in the government of Batavia, who had come from Holland to take their passage to Batavia, under the appointment of the Government of Holland.

There were also on board a lady, and some persons in the capacity of servants, making in the whole seventeen passengers.

Judgment,—Sir W. Scott:—

"This is the case of an admitted American vessel; but the title to

[1] Facts omitted and only extracts from the opinion are given. — Ed.

restitution is impugned, on the ground of its having been employed, at the time of the capture, in the service of the enemy, in transporting military persons first to Macao and ultimately to Batavia. That a vessel hired by the enemy for the conveyance of military persons is to be considered as a transport subject to condemnation, has been in a recent case held by this court, and on other occasions.

"What is the number of military persons that shall constitute such a case, it may be difficult to define. In the former case there were many, in the present there are much fewer in number; but I accede to what has been observed in argument, that number alone is an insignificant circumstance in the considerations, on which the principle of law on this subject is built, since fewer persons of high quality and character may be of more importance, than a much greater number of persons of lower condition. To send out one veteran general of France to take the command of the forces at Batavia, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater; and therefore it is what the belligerent has a stronger right to prevent and punish. In this instance the military persons are three, and there are, besides, two other persons, who were going to be employed in civil capacities in the government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me, on principle, to be but reasonable that, whenever it is of sufficient importance to the enemy that such persons should be sent out on the public service, at the public expence, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations.

"It has been argued, that the master was ignorant of the character of the service on which he was engaged, and that, in order to support the penalty, it would be necessary that there should be some proof of delinquency in him, or his owner. But, I conceive, that is *not* necessary; it will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. In the case of the Swedish vessel there was no *mens rea* in the owner, or in any other person acting under his authority. The master was an involuntary agent, acting under compulsion, put upon him by the officers of the French government, and, so far as intention alone is considered, *perfectly innocent*. In the same manner, in cases of *bona fide* ignorance, there may be no actual delinquency, but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing

the penalty of confiscation. If imposition has been practiced, it operates as force; and if redress in the way of indemnification is to be sought against any person, it must be against those, who have, by means either of compulsion or deceit, exposed the property to danger. If, therefore, it was the most innocent case on the part of the master, if there was nothing whatever to affect him with privity, the whole amount of this argument would be, that he must seek *his* redress against the freighter; otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible, in the greater number of cases, to prove the knowledge, and privity of the immediate offender.

"It has been argued throughout, as if the ignorance of the master *alone* would be sufficient to exempt the property of the owner from confiscation. But may there not be other persons, besides the master, whose knowledge and privity would carry with it the same consequences?

"Suppose the owner himself had knowledge of the engagement, would not that produce the *mens rea*, if such a thing is necessary? or if those who had been employed to act for the owner, had thought fit to engage the ship in a service of this nature, keeping the master in profound ignorance, would it not be just as effectual, if the *mens rea* is necessary, that it should reside in those persons, as in the owner?

"The observations which I shall have occasion to make on the remaining parts of this case will, perhaps, appear to justify such a supposition, either that the owner himself, or those who acted for him in Lisbon or in Holland, were connusant of the nature of the whole transaction. But I will first state *distinctly*, that the principle on which I determine this case is, that the carrying military persons to the colony of an enemy, who are there to take on them the exercise of their military functions, will lead to condemnation, and that the court is not to scan with minute arithmetic the number of persons that are so carried. If it has appeared to be of sufficient importance to the government of the enemy to send them, it must be enough to put the adverse government on the exercise of their right of prevention; and the ignorance of the master can afford no ground of exculpation in favour of the owner, who must seek his remedy in cases of deception, as well as of force, against those who have imposed upon him."[1]

[1] See the cases of *The Friendship*, 1807, 6 C. Rob. 420; and *The Caroline*, 1802, 4 C. Rob. 256.

In all these cases the offence is rather the engagement of the vessel as an enemy transport than the mere carrying of hostile persons as passengers.

"THE PANAMA."

SUPREME COURT OF THE UNITED STATES, 1899.

(176 *United States*, 535.)

At the time of the breaking out of the recent war with Spain, a Spanish mail steamship was on a voyage from New York to Havana, carrying a general cargo, passengers, and mails, and having mounted on board two breech-loading Hontoria guns of nine centimetre bore, and one Maxim rapid-firing gun, and having also on board twenty Remington rifles and ten Mauser rifles, with ammunition for all the guns and rifles, and thirty or forty cutlasses. Her armament had been put on board more than a year before, for her own defence, as required by her owner's mail contract with the Spanish Government, which also provided that, in case of war, that government might take

In a note to the case of *The Friendship*, Dr. Robinson says: "The act of carrying the soldiers of the enemy has been in former wars assimilated to contraband, by public proclamation and instructions, and has been declared to render the ship liable to condemnation. The declaration of war, 25th March, 1744, concludes with the following clause:

"'And we do hereby command our own subjects, and advertise all other persons of whatever nation soever, not to transport or carry any *soldiers*, arms, powder, ammunition, or other contraband goods, to any of their territories, lands, plantations, or countries of the said French King, declaring, that whatsoever ship or vessel shall be met withal transporting or carrying any *soldiers*, arms, powder, ammunition, or other contraband goods, etc. * * *, the same being taken, shall be condemned as good and lawful prize.'

"The same declaration is also inserted in the second article of the instruction to cruisers, of the same date; also in the second article of the instructions in the war with Spain, 20th Dec., 1768.

"In the celebrated *Trent case*, occurring in 1862, Messrs. Mason and Slidell were removed from a British private vessel by Commodore Wilkes of the *San Jacinto*, a public vessel of the United States. Great Britain insisted that the rights of a neutral vessel not only had been violated, for which she demanded apology, but she insisted that those persons should be replaced and returned on board a British ship. This was done, and they were actually placed on board a British vessel in or near the harbor of Boston. They were not British subjects, and their return could only have been demanded for the reason that they had been torn from British soil, and the sanctity of British soil, as represented by a British ship, had been violated. Citizenship or residence had no influence upon the question." Per Mr. Justice Hunt in *Crapo* v. *Kelley*, 1872, 16 Wall. 610, 631.

It may be said that Mr. Seward, at that time Secretary of State, admitted that these persons could not lawfully be taken from the *Trent* at sea, but contended that it might have been brought in as prize. See Lawrence's Wheaton, 939; Dana's Wheaton, 644; 3 Wharton's Digest, §§ 325, 328, 329, 374; Bernard, Neutrality of Great Britain, 187–225. For a conservative British view, see Hall, Int. Law, 705–708. — ED.

possession of the vessel with her equipment, increase her armament, and use her as a war vessel, and, in these and other provisions, contemplated her use for hostile purposes in time of war. From the decree of the District Court for the Southern District of Florida, condemning the steamship, an appeal was taken to the Supreme Court of the United States.[1]

Mr. Justice GRAY delivered the opinion of the court.[2]

The recent war with Spain, as declared by the act of Congress of April 25, 1898, c. 189, and recognized in the President's proclamation of April 26, 1898, existed on and after April 21, 1898. 30 Stat. 364, 1770. This proclamation declared, among the rules on which the war would be conducted, the following:

"4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government."

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

It has been decided by this court, in the recent case of *The Buena Ventura*, 175 U. S. 384, that a Spanish merchant vessel, which had sailed before April 21, 1898, from a port of the United States on a voyage to a foreign port, not having on board any officer in the military or naval service of Spain, nor any article contraband of war, nor any despatch of or to the Spanish Government, was protected by the fourth clause of the President's proclamation of April 26, 1898, from condemnation while on that voyage; but that her capture, before that proclamation was issued, was with probable cause; and that she should therefore be ordered to be restored to her owner, but without damages or costs.

That case would be decisive of this one, but for the mails and the arms carried by the *Panama*, and the contract with the Spanish Government under which the arms were put on board.

It was argued in behalf of the claimant that, independently of her being a merchant vessel, she was exempt from capture by reason of

[1] The head-note of the official reporter so admirably states the case that it is substituted for the statement of the court. — ED.

[2] Part of the opinion is omitted. — ED.

her being a mail steamship and actually carrying mail of the United States.

There are instances in modern times, in which two nations, by convention between themselves, have made special agreements concerning the mail ships. But international agreements for the immunity of the mail ships of the contracting parties in case of war between them have never, we believe, gone farther than to provide, as in the postal convention between the United States and Great Britain in 1848, in that between Great Britain and France in 1833, and in other similar conventions, that the mail packets of the two nations shall continue their navigation, without impediment or molestation, until a notification from one of the governments to the other that the service is to be discontinued; in which case they shall be permitted to return freely, and under special protection, to their respective ports. And the writers on international law concur in affirming that no provision for the immunity of mail ships from capture has as yet been adopted by such a general consent of civilized nations as to constitute a rule of international law. 9 Stat. 969; Wheaton (8th ed.), pp. 659–661, Dana's note; Calvo (5th ed.), §§ 2378, 2809; De Boeck, §§ 207, 208. De Boeck, in § 208, after observing that, in the case of mail packets between belligerent countries, it seems difficult to go farther than in the convention of 1833, above mentioned, proceeds to discuss the case of mail packets between a belligerent and a neutral country, as follows: "It goes without saying that each belligerent may stop the departure of its own mail packets. But can either intercept enemy mail packets? There can be no question of intercepting neutral packets, because communications between neutrals and belligerents are lawful, in principle, saving the restrictions relating to blockade, to contraband of war, and the like; the right of search furnishes belligerents with a sufficient means of control. But there is no doubt that it is possible, according to existing practice, to intercept and seize the enemy's mail packets."

The provision of the sixth clause of the President's proclamation of April 26, 1898, relating to interference with the voyages of mail steamships, appears by the context to apply to neutral vessels only, and not to restrict in any degree the authority of the United States, or of their naval officers, to search and seize vessels carrying the mails between the United States and the enemy's country. Nor can the authority to do so, in time of war, be affected by the facts that before the war a collector of customs had granted a clearance, and a postmaster had put mails on board, for a port which was not then, but has since become, enemy's country. Moreover, at the time of the capture of the *Panama*, this proclamation had not been issued. With-

out an express order of the government, a merchant vessel is not privileged from search or seizure by the fact that it has a government mail on board. *The Peterhoff*, 5 Wall. 28, 61.

The mere fact, therefore, that the *Panama* was a mail steamship, or that she carried mail of the United States on this voyage, does not afford any ground for exempting her from capture.

The remaining question in the case is whether the *Panama* came within the class of vessels described in the fourth clause of the President's proclamation of April 26, 1898, as "Spanish merchant vessels," and as not "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government."

On the part of the claimant, it was argued that the arms which the *Panama* carried, under the requirements of her mail contract and for the protection of the mails, are not to be regarded as contraband or munitions of war, within the sense of this clause; that "contraband," as therein referred to, means contraband cargo, not contraband portion of the ship's permanent equipment; and that, if the furnishings of a ship could be regarded as contraband, every ship would have contraband on board.

On the other hand, it was contended, in support of the condemnation, that the arms which the *Panama* carried, belonging to her owner, were contraband of war, and rendered her liable to capture; and that by reason of her being so armed, and of the provisions of her mail contract with the Spanish Government, requiring her armament, and recognizing the right of that government, in case of a suspension of the mail service by war, to take possession of her for warlike purposes, she cannot be considered as a merchant vessel, within the meaning of the proclamation, but must be treated like any regular vessel of the Spanish navy under similar circumstances.

The claimant much relied on a case decided in 1800 by the French Council of Prizes, in accordance with the opinion and report of Portalis, himself a high authority. Wheaton (8th ed.), p. 460; De Boeck, § 81. In the case referred to, an American vessel, carrying ten cannon of various sizes, together with muskets and munitions of war, had been captured by French frigates; and had been condemned by two inferior French tribunals, upon the ground that she was armed for war, and had no commission or authority from her own government. The claimants contended that their ship, being bound for India, was armed for her own defence, and that the munitions of war, the muskets and the cannon that composed her armament did not exceed what was usual in like cases for long voyages. Upon this point Por-

talis, acting as commissioner of the French Government, reported his conclusion on the question of armament as follows: "For my part, I do not think it is enough to have or to carry arms, to incur the reproach of being armed for war. Armament for war is of a purely offensive nature. It is established when there is no other object in the armament than that of attack, or, at least, when everything shows that such is the principal object of the enterprise; then a vessel is deemed enemy or pirate, if she has no commission or papers sufficient to remove all suspicion. But defence is a natural right, and means of defence are lawful in voyages at sea, as in all other dangerous occupations of life. A ship which had but a small crew, and a considerable cargo, was evidently intended for commerce, and not for war. The arms found on this ship were evidently intended, not for committing acts of rapine or hostility, but for preventing them; not for attack, but for self-defence. The pretext of being armed for war therefore appears to me to be unfounded." The Council of Prizes, upon consideration of the report of Portalis, adjudged that the capture of the vessel and her cargo was null and void, and ordered them to be restored, with damages. *The Pégou*, or *Pigou*, 2 Pistoye et Duverdy, Prises Maritimes, 51; s. c. 2 Cranch, 96–98, and note.

But in that case the only question at issue was whether a neutral merchant vessel, carrying arms solely for her own defence, was liable to capture for want of a commission as a vessel of war or privateer. That the capture took place while there was no state of war between France and the United States is shown by her being treated, throughout the case, as a neutral vessel; if she had been enemy's property, she would have been lawful prize, even if she had a commission, or if she were unarmed. She was not enemy's property, nor in the enemy's possession, nor bound to a port of the enemy; nor had her owner made any contract with the enemy by which the enemy was, or would be, under any circumstances, entitled to take and use her, either for war, or for any other purpose.

Generally speaking, arms and ammunition are contraband of war. In *The Peterhoff*, 5 Wall. 28, Chief Justice Chase, delivering the judgment of this court, said: "The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured, and primarily and ordinarily used, for military purposes in time of war; the the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles

exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege." And it was adjudged that so much of the cargo of the *Peterhoff*, as consisted of artillery harness, artillery boots, and army shoes and blankets, came fairly under the description of goods primarily and ordinarily used for military purposes in time of war; and, being destined directly for the use of the rebel military service, came within the second, if not within the first class of goods contraband of war. 5 Wall. 58.

Yet it must be admitted that arms and ammunition are not contraband of war, when taken and kept on board a merchant vessel as part of her equipment, and solely for her defence against "enemies, pirates, and assailing thieves," according to the ancient phrase still retained in policies of marine insurance. Pratt, in his essay on the Law of Contraband of War, speaking of the class of "articles which are of direct use in war," says: "With respect to these no questions can arise. On proof of the use of the article being solely or particularly applicable to hostile purposes, the conveyance of it to the enemy would amount to such a direct interposition in the war as necessarily to entail the confiscation of the property." But he afterwards adds this qualification: "But even in the case of articles of direct use in war, an exception is always made in favor of such a quantity of them as may be supposed to be necessary for the use or defence of the ship." And again, speaking of "warlike stores," he says: "These are, from their very nature, evidently contraband; but every vessel is, of course, allowed to carry such a quantity as may be necessary for purposes of defence; this provision is expressly introduced in many treaties." Pratt, Contraband of War, xxii, xxv, xl. And at pages 239, 244, 245 of his appendix he quotes express provisions to that effect in the treaties between Great Britain and Russia in 1766, 1797, and 1801. See also *Cases of Dutch and Spanish Ships*, 6 C. Rob. 48; *The Happy Couple*, Stewart Adm. (Nova Scotia), 65, 69; Madison, quoted in 3 Whart. Int. Law Dig. § 368, p. 313.

But the fact that arms carried by a merchant vessel were originally taken on board for her own defence is not conclusive as to her character. This is clearly shown by the case of *The Amelia* (1801), reported by the name of *Talbot* v. *Seeman*, 1 Cranch, 1. In that case, during the naval warfare between the United States and France near the end of the last century, a neutral merchant vessel, having eight iron can-

non and eight wooden guns mounted on board, and a cargo of merchandise, sailed from Calcutta for Hamburg, both being neutral ports; and before reaching her destination was captured by a French cruiser, and put by her captors, with the cannon still on board, in charge of a French prize crew, with directions to take her into a French port for adjudication as prize; and on her way thither was recaptured by a United States ship of war. The recapture was held to be lawful, and to entitle the recaptors to salvage before restoring the vessel to her neutral owner, because, as Chief Justice Marshall said, "The *Amelia* was an armed vessel commanded and manned by Frenchmen," "she was an armed vessel under French authority, and in a condition to annoy the American commerce." 1 Cranch, 32. And in *The Charming Betsy*, 1804, 2 Cranch, 64, that case was expressly approved, as a precedent to be followed under similar circumstances; but was held to be inapplicable where the arms on board at the time of the recapture were but a single musket and a small amount of powder and ball. 2 Cranch, 121. Notwithstanding that the *Amelia* was a neutral vessel, with an armament originally taken on board for defence only, and therefore, while in the possession of her neutral owner, would not (according to the French case above cited) have been liable to capture as an armed vessel, yet, after she had been taken possession of by the enemy, with the same armament still on board, and thus was in a condition to be used by the enemy for hostile purposes, the fact that the original purpose of the armament was purely defensive did not prevent her from being considered as an armed vessel of the enemy.

While the authorities above referred to present principles and analogies worthy of consideration in the case at bar, they furnish no conclusive rule to govern its determination. The decision of this case must depend upon its own facts, and upon the true construction of the President's proclamation.

As to the facts, there is no serious dispute. The matters stated in the test affidavits upon which the motion for further proof was based, add nothing of importance to the facts disclosed by the testimony *in preparatorio*, and by the mail contract between her owner and the Spanish Government, which forms part of the ship's papers.

That contract contains many provisions looking to the use of the company's steamships by the Spanish Government as vessels of war. Among other things, it requires that each vessel shall have the capacity to carry 500 enlisted men; that that government, upon inspection of her plans as prepared for commercial and postal purposes, may order her deck and sides to be strengthened so as to support additional artillery; and that, in case of the suspension of the mail service by a

naval war, or by hostilities in any of the seas or ports visited by the company's vessels, the government may take possession of them with their equipment and supplies, at a valuation to be made by a commission; and shall, at the termination of the war, return them to the company, paying five per cent on the valuation while it has them in its service, as well as an indemnity for any diminution in their value.

The *Panama* was not a neutral vessel; but she was enemy property, and as such, even if she carried no arms (either as part of her equipment, or as cargo), would be liable to capture, unless protected by the President's proclamation.

It may be assumed that a primary object of her armament, and, in time of peace, its only object, was for purposes of defence. But that armament was not of itself inconsiderable, as appears, not only from the undisputed facts of the case, but from the action of the District Court, upon the application of the commodore commanding at the port where the court was held, and on the recommendation of the prize commissioners, directing her arms and ammunition to be delivered to the commodore for the use of the Navy Department. And the contract of her owner with the Spanish Government, pursuant to which the armament had been put on board, expressly provided that, in case of war, that government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel; and, in these and other provisions, evidently contemplated her use for hostile purposes in time of war.

She was, then, enemy property, bound for an enemy port, carrying an armament susceptible of use for hostile purposes, and herself liable, upon arrival in that port, to be appropriated by the enemy to such purposes.

The intent of the fourth clause of the President's proclamation was to exempt for a time from capture peaceful commercial vessels; not to assist the enemy in obtaining weapons of war. This clause exempts "Spanish merchant vessels" only; and expressly declares that it shall not apply to "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government."

Upon full consideration of this case, this court is of opinion that the proclamation, expressly declaring that the exemption shall not apply to any Spanish vessel having on board any article prohibited or contraband of war, or a single military or naval officer, or even a despatch, of the enemy, cannot reasonably be construed as including, in the description of "Spanish merchant vessel," which are to be temporarily exempt from capture, a Spanish vessel owned by a subject of

the enemy; having an armament fit for hostile use; intended, in the event of war, to be used as a war vessel; destined to a port of the enemy; and liable, on arriving there, to be taken possession of by the enemy, and employed as an auxiliary cruiser of the enemy's navy, in the war with this country.

The result is, that the *Panama* was lawfully captured and condemned, and that the decree of the District Court must be

Affirmed.

Mr. Justice Peckham, dissented.

Section 44. — Blockade.

THE "NEPTUNUS."

High Court of Admiralty, 1799.

(2 *C. Robinson*, 110.)

This was a case of a vessel sailing on a voyage from Dantzic to Havre, 26th October, 1798, and taken in attempting to enter that port on 26th November.

Judgment,—Sir Wm. Scott:—

"This is a case of a ship and cargo seized in the act of entering the port of Havre in pursuance of the original intention under which the voyage began. The notification of the blockade of that port was made on the 23d January, 1798, and this transaction happened in November in that year; the effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it; it is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold therefore that a neutral master can never be heard to aver against a notification of blockade, that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise, but this is the case of a blockade by notification; another distinction between a notified blockade and a blockade existing *de facto* only, is that in the former,

the act of sailing to a blockaded place is sufficient to constitute the offence. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up, and from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation: it may be different in a blockade existing *de facto* only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse, for sailing on a doubtful and provisional destination. But this is a case of a vessel from Dantzick after the notification, and the master cannot be heard to aver his ignorance of it. He sails:—till the moment of meeting Admiral Duncan's fleet, I should have no hesitation in saying, that, if he had been taken, he would have been taken *in delicto*, and have subjected his vessel to confiscation; but he meets Admiral Duncan's fleet, and is examined, and liberated by the captain of an English frigate belonging to that fleet, who told him that he might proceed on his destination, and who, on being asked, Whether Havre was under a blockade? said, 'it was not blockaded,' and wished him a good voyage. The question is, In what light he is to be considered after receiving this information? That it was *bona fide* given cannot be doubted, as they would otherwise have seized the vessel; the fleet must have been ignorant of the fact; and I have to lament that they were so: When a blockade is laid on, it ought by some kind of communication to be made known not only to foreign governments, but to the King's subjects, and particularly to the King's cruisers; not only to those stationed at the blockaded ports, but to others, and especially considerable fleets, that are stationed *in itinere*, to such a port from the different trading countries that may be supposed to have an intercourse with it.

"Perhaps it would have been safer in the English captain to have answered, that he could not say anything of the situation at Havre; but the fact is (and it has not been contradicted), that the British officer told the master 'that Havre was not blockaded.' Under these circumstances, I think that after this information he is not taken *in delicto*. I do not mean to say that the fleet could give the man any authority to go to a blockaded port; it is not set up as an authority, but as intelligence affording a reasonable ground of belief; as it could not be supposed, that such a fleet as that was, would be ignorant of the fact.

"From that time I consider that a state of innocence commences; the man was not only in ignorance, but had received positive information that Havre was not blockaded. Under these circumstances,

I think it would be a little too hard to press the former offence against him; it would be to press a pretty strong principle rather too strongly; I think I cannot look retrospectively to the state in which he stood before the meeting with the British fleet, and therefore I shall direct this vessel *and cargo* to be restored."

THE "BETSEY."

High Court of Admiralty, 1798.

(1 *C. Robinson*, 92 *a*.)

Judgment. — Sir W. Scott:[1] —

"On the question of blockade three things must be proved: 1st, the existence of an actual blockade; 2dly, the knowledge of the party; and, 3dly, some act of violation, either by going in, or by coming out with a cargo laden after the commencement of blockade. The time of shipment would on this last point be very material, for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port.

"It is necessary, however, that the evidence of a blockade should be clear and decisive: but in this case there is only an affidavit of one of the captors, and the account which is there given is, 'that on the arrival of the British forces in the West Indies, a proclamation, inviting the inhabitants of Martinique, St. Lucie, and Guadaloupe to put themselves under the protection of the English; that on a refusal, hostile operations were commenced against them all;' but it cannot be meant that they began immediately against all at once; for it is notorious that they were directed against them separately and in succession. It is further stated, 'that in January, 1794 (but without any more precise date), Guadaloupe was summoned, and was then put into a state of complete investment and blockade.'

"The word complete is a word of great energy; and we might expect from it to find, that a number of vessels were stationed round

[1] Facts omitted, and only part of the judgment is given. — Ed.

the entrance of the port to cut off all communication: but, from the protest, I perceive that the captors entertained but a very loose notion of the true nature of a blockade; for it is there stated, 'that on the 1st of January, after a general proclamation to the French islands, they were put into a state of *complete* blockade.' It is a term, therefore, which was applied to all those islands at the same time, under the first proclamation.

"The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade: it is clear, indeed, that it could not in reason be sufficient to produce the effect, which the captors erroneously ascribed to it: but from the misapplication of these phrases in one instance, I learn, that we must not give too much weight to the use of them on this occasion; and, from the generality of these expressions, I think, we must infer, that there was not that actual blockade which the law is now distinctly understood to require.

"But it is attempted to raise other inferences on this point, from the manner in which the master speaks of the difficulty and danger of entering; and from the declaration of the municipality of Guadaloupe, which states 'the island to have been in a state of siege.' It is evident the American master speaks only of the difficulty of avoiding the English cruisers generally in those seas; and as to the other phrase, it is a term of the new jargon of France, which is sometimes applied to domestic disturbances; and certainly is not so intelligible as to justify me in concluding, that the island was in a state of investment, from a foreign enemy, which we require to constitute blockade: I cannot, therefore, lay it down, that a blockade did exist, till the operations of the forces were actually directed against Guadaloupe in April.

"It would be necessary for me, however, to go much farther, and to say that I am satisfied also that the parties had knowledge of it: but this is expressly denied by the master. He went in without obstruction. Mr. Incledon's statement of his belief of the notoriety of the blockade is not such evidence as will alone be sufficient to convince me of it. With respect to the shipment of the cargo, it does not appear exactly under what circumstances or what time it was taken in: I shall therefore dismiss this part of the case. * * *"

THE "PANAGHIA RHOMBA."

PRIVY COUNCIL, 1858.

(12 *Moore's Privy Council*, 168.)

The Right Hon. T. PEMBERTON LEIGH : [1] —

This case involves a general principle of so much importance that their lordships thought it desirable to take time for its consideration, although they had a strong impression at the hearing as to the decision at which they must arrive.

The *Panaghia Rhomba* took in a cargo of wheat at Galatz, in the month of September, 1855, to be conveyed to the Piraeus or Syra, on the joint account of Signor Cuppa, an Ionian merchant, resident in Constantinople, and of Messrs. Baltazzi, British merchants, resident in London.

In the month of November following, the vessel was captured by her Majesty's ship *Dauntless*, for an attempt to violate the blockade of the port of Odessa, which had subsisted from the month of February, 1855, and was then continuing.

The ship has been condemned by the court below upon evidence which quite satisfies their lordships of the propriety of the sentence; and the question now raised is, whether it is competent to the claimants of the cargo to protect their property from condemnation by showing their innocence in the transaction; or whether, under the circumstances of this case, the owners of the cargo are concluded by the illegal act of the master, though it may have been done without their privity, and even contrary to their wishes.

It has been held by the court below, that the owners are so concluded, and that the rule upon the subject is established by authority not now to be questioned.

The first case to which we have been referred is the *Mercurius* (1 Rob. 80), which came before Lord Stowell in 1798. There a cargo had been put on board the *Mercurius* in America, at a time when it could not have been known in that country that a blockade of the Texel had been established. The master, after warning, attempted to enter the Texel, and the ship was condemned, because the owner was bound by the act of the master; but the cargo was restored, because, as Lord Stowell observes, the shippers at the time of shipment could not have known of the blockade, and the master, though he was the agent of

[1] Facts omitted as the judgment sufficiently states the case. — ED.

owner of the vessel, and could bind him by his contract or his misconduct, was not the agent of the owners of the cargo, unless expressly so constituted by them. Lord Stowell, in that case, addressed himself to the argument of the captors, that to exempt the cargo from condemnation would open a door to fraud, if neutrals were allowed to trade with blockaded ports with immunity, by throwing the blame upon the carrier-master; and, in answer to that objection, he observed, that "if such an artifice could be proved, it would establish that *mens rea* in the neutral merchant which would expose his property to confiscation, and it would be at the same time sufficient to cause the master to be considered in the character of agent, as well for the cargo as for the ship."

In that case Lord Stowell seems to have thought that the owners of the cargo were not bound by the act of the master without their authority, and the judgment seems rather to warrant the marginal note which the very learned reporter has stated as the effect of it, namely, "Violation of blockade by the master affects the ship, but not the cargo, unless the property of the same owner, or unless the owner is cognizant of the intended violation."

Now, in the present case, Dr. Lushington has stated his conviction that the owners of the cargo were innocent of all knowledge of the intended violation; and if, therefore, the law remained as it is to be collected from the case of the *Mercurius*, their lordships would have great difficulty in assenting to the decision now under review.

But subsequent cases seem to have carried the rule much further, and to have established that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, and they might, therefore, by possibility be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence; that in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent, the master shall be treated as the agent for the cargo as well as for the ship. This is the result of the cases cited by Dr. Lushington in his judgment, and the additional authorities mentioned at the bar.

In the case of the *Alexander* (4 Rob. 94), which occurred in 1801, Lord Stowell held that, in cases of breach of blockade, the court must infer "that a ship going in fraudulently, is going in the service of the cargo, with the knowledge and by the direction of the owner."

In the case of the *Adonis* (5 Rob. 259), which occurred in 1804, he went a step further, and held not only that such inference must be made, but that (with the exception to which we have already referred) the owners could be not let in to prove a contrary intention. This case

was affirmed upon appeal, and it possesses, therefore, all the authority which the decisions of the tribunal of a single country can give in a law in which all civilized countries are concerned.

The same doctrine is laid down by the same great judge in the case of the *Exchange* (1 Edward's Rep. 42), in 1808, and in the *James Cook* (1 Edwards, 261) in 1810.

We find, therefore, a series of authorities establishing a general rule, which, like all general rules, may in its application to particular cases be occasionally attended with hardship, but which, nevertheless, may be necessary to prevent fraud, and may, on the whole, promote the purposes of justice. It is a rule not applicable exclusively to neutrals, but applies with equal force to all persons attempting to violate a blockade, though they may be the subjects or the allies of the country which has established it. In the present case, indeed, Messrs. Baltazzi, the claimants, are British subjects.

The propriety, or rather the necessity, of acting upon these rules, is rested by Lord Stowell on the notoriety of the fact that in almost all cases of breach of blockade, the attempt is made for the benefit and with the privity of the owners of the cargo; that if they were at liberty to allege their innocence of the act of the master, it would always be easy to manufacture evidence for the purpose, which the captors would have no means of disproving; and that, in order to make a blockade effectual, it is essential to hold the cargo responsible to the blockading power for the act of the master, to whom the control over it has been entrusted, leaving the owners to seek their remedy against the master or the owners of the ship, if, in reality, the penalty was incurred without any privity on their part.

It is impossible not to feel the force of this reasoning; it rests on the same grounds with another rule of the Prize Courts, which treats as invalid the sale of a ship *in transitu*, a point upon which we have had very recently to examine the law.[1]

Against a rule, acted upon and promulgated to the world for so many years, the counsel for the appellants, though challenged to do so by the respondents, have not produced a single decision or dictum by any one judge or jurist in any part of the world. Under these circumstances, their lordships must consider it as a settled principle of prize law by which they are bound.

Holding themselves to be precluded by the rule of law from looking into the evidence in the case in order to judge of the guilt or innocence of the claimants, they can express no opinion upon this subject. But they think that, as the learned judge in the court below has declared his conviction of their entire innocence, and his reluctance to

[1] In *The Baltica*, 11 Moore's P. C. Cases, 141.

pronounce the sentence complained of, the claimants may fairly be considered to have been invited to bring this appeal, and that in affirming the sentence, her Majesty should be advised to make the order without awarding costs against the appellants.[1]

THE "JOHANNA MARIA."

PRIVY COUNCIL, 1855.

(10 *Moore's Privy Council*, 70.)

The Right Hon. T. PEMBERTON LEIGH:[2] —

This vessel entered Riga on the 20th of May, after all difficulty arising from the Order in Council of the 15th of April had been removed. She came out again on the 24th of May, having taken on board a cargo, with a full knowledge of the existence of the blockade at the time of loading, and in the expectation, as it is said, that the worst that could happen would be that she would be sent back by the British ships forming the blockade, to unload her cargo.

The only ground upon which she could ask to be relieved from condemnation would be, that the letter of Sir Charles Napier, of the 27th of May, 1854, and the subsequent announcement by the British Government in the London *Gazette*, of the 14th of August, would be sufficient to annul all that has previously taken place, and, on the

[1] The gist of blockade is to prevent trade with the enemy: where this feature is wanting, courts are not over stringent in applying the strict rule of condemnation. Thus, in *U. S.* v. *Guillem*, 1850, 11 How. 47, a Frenchman was permitted to leave Vera Cruz, a blockaded port, on board a French vessel, for France. Mr. Chief Justice Taney, in a brief and careful opinion, made the following points: 1. That a neutral leaving a belligerent country, in which he was domiciled at the beginning of the war, is entitled to the rights of a neutral in his person and property, as soon as he sails from the hostile port; 2. The property he takes with him is not liable to condemnation for a breach of blockade by the vessel in which he embarks, when entering or departing from the port, unless he knew of the intention of the vessel to break it in going out.

Neutral vessels, lying in the enemy harbor at the outbreak of war, are legally and innocently there. They are, therefore, permitted to depart in peace before applying the blockade. "The period," says Mr. Hall (Int. Law, 733), "which is allowed for the exit of ships is usually fixed at fifteen days, and during this time vessels may issue freely in ballast or with a cargo *bona fide* bought and shipped before the commencement of the blockade. This time was given in 1848 and 1864 by Denmark; by England and France during the Crimean war; by the United States during the civil war, and by France in the war of 1870." By proclamation of April 22, 1898, the late President McKinley generously doubled this period. 19 Richardson's Messages and Papers, 202. — ED.

[2] Statement of the case omitted. — ED.

principles laid down by Lord Stowell, in *The Rolla* (6 Rob. 368), to postpone all penalties for breach of blockade till after the 28th of May.

Their lordships, however, are of opinion that such a judgment would carry the doctrine referred to further than either the decision itself or sound principle would warrant. In that case, Lord Stowell observed that the blockade had been very lax; that several vessels had been permitted by the blockading squadron to enter, and the observations relied on must be understood with regard to the circumstances out of which they arose. In this case, from the 5th of May, there had been an uninterrupted blockade; no single instance has been produced in which any vessel had been permitted by any of the blockading ships to enter the port; nor had any been permitted to come out after the 15th of May, with cargoes subsequently loaded. There is clear proof of a *de facto* blockade; full knowledge of it by the master, and nothing which could mislead him as to its extent or effect. The usual consequences must, therefore, follow, and the sentence below be affirmed, but without costs of the appeal.

By respective Orders in Council the sentences in these cases, as well as the sentences relating to the condemnation of their cargoes, were reversed, and simple restitution decreed.[1]

THE "FRANCISKA."

Privy Council, 1855.

(10 *Moore's Privy Council*, 37.)

On the 5th of April, 1854, the commander of the Baltic fleet blockaded, *de facto*, the coast of Courland, but his notice to the British Ministers, including the British Minister at Copenhagen, was of that character that the impression was that all the Russian ports in the Baltic were blockaded. The British Government also on that date issued an Order in Council, giving permission up to the 15th of May, for Russian vessels to discharge their cargoes from Russian ports in the Baltic and White Sea to their port of destination, even though those ports were in a state of blockade. A similiar permission was granted by the French Government. And the Russian Government by a Ukase allowed the same indulgence to English and French ships.

[1] In addition to *The Rolla*, 1807, 6 C. Rob. 364, the following cases were referred to in the argument: *The Neptunus*, 1799, 2 C. Rob. 110, *ante*; *The Juffrow Maria Schroeder*, 1800, 3 C. Rob. 147. — Ed.

On the 14th of May, 1854, a neutral vessel, under Danish colors, sailed from Copenhagen for Riga, and was captured off Riga by an English ship of war on the 22d of that month, for a breach of the blockade of that port. From Dr. Lushington's decree of condemnation an appeal was taken to the Privy Council.[1]

The Right Hon. T. Pemberton Leigh: [2] —

As regards export, therefore, from the Baltic ports, by the effect of these several ordinances all restriction up to the 15th of May, on the conveyance of cargoes in Russian vessels to British and French ports, was removed; and though British and French vessels would, by the general law of nations, be liable to confiscation for breach of blockade, by sailing from blockaded ports with cargoes taken on board after notice of the blockade, and the permission to export is, by the orders, in terms, confined to Russian vessels, it seems improbable that the Allied Powers could intend to deprive their subjects of the indulgence granted to them by the Russian Government, or to subject their property to confiscation for doing what the enemy was permitted to do with impunity.

In effect, therefore, neutrals only would be excluded from that commerce which belligerents might safely carry on; and the question is, whether by the law of nations such exclusion be justifiable; and, if not, in what manner and to what extent neutral powers are entitled to avail themselves of the objection.

That such exclusion is not justifiable is laid down in the clearest and most forcible language in the following passage of the judgment now under review: "The argument stands thus: by the law of nations a belligerent shall not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations; and, therefore, no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of states not engaged in the war. The foundation of the principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy, all relations of trade being by war itself suspended. To this principle I entirely concede; and I should regret to think if any authority could be cited from the decisions of any British court administering the law of nations, which could be with truth asserted to maintain a contrary doctrine."

The learned judge, after discussing the question how far licenses to enter blockaded ports would invalidate a blockade, and pointing out the important distinctions between blockades according to the ordinary

[1] This statement is taken from the head-note of the case. — Ed.

[2] Only a part of the elaborate opinion of this very learned judge is given. — Ed.

law of nations, and the blockades introduced during the last war by the Berlin and Milan decrees on the one hand, and the British Orders in Council on the other, and between special licenses granted for a particular occasion and licenses granted indiscriminately, proceeds, "I think that if the relaxation of a blockade be, as to belligerents, entire, the blockade cannot lawfully subsist; if it be partial and such as to exceed special occasion, that, to the extent of such partial relaxation, neutrals are entitled to a similar benefit." And he concludes his able discussion of this part of the case, in these words: "With respect to the present question I, therefore, have come to the conclusion, that as Russian vessels might have left the ports of Courland up to the 15th of May, the subjects of neutral states ought to be entitled to the same advantages, and if there be any vessel so circumstanced I should hold her entitled to restitution. I think the remedy should be commensurate with the grievance." The learned judge holds that such relaxation does not affect the general validity of the blockade.

In order to judge how far this conclusion can be maintained, it is necessary to consider upon what principles the right of a belligerent to exclude neutrals from a blockaded port rests. That right is founded, not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of two belligerents during war all the trade that was open to him in times of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, namely, that a neutral has no right to interfere with the military operations of a belligerent, either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded.

Grotius expresses himself upon the subject in these terms: — "Si juris mei executionem rerum subvectio impedierit, idque scire potuerit, qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur, tenebitur ille mihi de damno culpâ dato." De Jure Belli ac Pacis, lib. III. c. I. s. V.

Bynkershoek's commentary on this passage is to the effect that it is unlawful to carry anything, whether contraband or not, to a place thus circumstanced, since those who are within may be compelled to surrender, not merely by the direct application of force, but also by the want of provisions and other necessaries. "Sola obsidio in causâ est, cur nihil obsessis subvehere liceat, sive contrabandum sit, sive non sit, nam obsessi non tantum vi coguntur ad deditionem, sed et fame, et alia aliarum rerum penuria." Quae. Jur. Pub. lib. I. c. II.

Wheaton in his Elements of International Law, Vol. II. pp. 228-230,

justly observes that this passage in Bynkershoek goes too far, and that a blockade is not confined to the case where there is a siege or blockade with a view to the capture of a place or the expectation of peace. But these passages seem to point to the reason on which this interference with the ordinary rights of neutrals was originally justified.

Vattel lays down the same doctrine: — "Quand je tiens une place assiégée, ou seulement bloquée, je suis en droit d'empecher que personne n'y entre, et de traiter en ennemi quiconque entreprend d'y entrer, sans ma permission, ou d'y porter quoi que ce soit: car il s'oppose à mon entreprise, il peut contribuer à la faire échouer, et par la me faire tomber dans tous les maux d'une guerre malheureuse." B. III. c. VII. s. 1, 17.

These passages refer only to ingress and the importation of goods, but it is clear that the operations of the siege or blockade may be interrupted by any communication of the blockaded or besieged place with foreigners; and Lord Stowell, when he defines a blockade, always speaks of it as the exclusion of the blockaded place from all commerce, whether by egress or ingress. In *The Frederick Molke*, 1 Rob. 87, he says: "What is the object of a blockade? not merely to prevent an importation of supplies; but to prevent export as well as import; and to cut off all communication of commerce with the blockaded place. In *The Betsey*, 1 Rob. 93, "After the commencement of a blockade a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy." In the *Vrouw Judith*, 1 Rob. 151, "A blockade is a sort of circumvallation round a place by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than of importation." In *The Rolla*, 6 Rob. 372, "What is a blockade but a uniform universal exclusion of all vessels not privileged by law?" In *The Success*, 1 Dods. 134, "The measure which has been resorted to, being in the nature of a blockade, must operate to the entire exclusion of British as well as neutral ships; for it would be a gross violation of neutral rights, to prohibit their trade, and to permit the subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded."

It is contended that the objection of a neutral to the validity of a blockade, on the ground of its relaxation by a belligerent in his own favor, is removed if a Court of Admiralty allows to the neutral the same indulgence which the belligerent has reserved to himself or granted to his enemy. But their lordships have great difficulty in

assenting to this proposition. In the first place, the particular relaxation, which may be of the greatest value to the belligerents, may be of little or no value to the neutral. In the instance now before the court it may have been of the utmost importance to Great Britain that there should be brought into her ports cargoes which, at the institution of the blockade, were in Riga; and it may have been for her advantage, with that view, to relax the blockade. But a relaxation of the blockade to that extent, and a permission to neutrals to bring such cargoes to British ports may have been of little or no value to neutrals.

The counsel on both sides at their lordships' bar understood that the learned judge in this case intended thus to limit the rights of neutrals, and to place neutral vessels only in the same situation as Russians, under the Order in Council. Their lordships would be inclined to give a more liberal interpretation to the language of the judgment; yet if this be done, the allowance of a general freedom of commerce, by way of export, to all vessels and to all places from a blockaded port, seems hardly consistent with the existence of any blockade at all.

Again it is not easy to answer the objections a neutral might make, that the condition of things which alone authorizes any interference with his commerce does not exist, namely, the necessity of interdicting all communication by way of commerce with the place in question; that a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with such place, must submit to the same inconvenience himself; and that if he is at liberty to select particular points in which it suits his purpose that the blockade should be violated with immunity, each neutral, in order to be placed on equal terms with the belligerent, should be at liberty to make such selection for himself.

But the ambiguity in which all these questions are left by the Order in Council of the 15th of April; the doubt whether the liberty accorded to enemies' vessels extends to neutrals, and, if so, whether such liberty is subject to the same restrictions, or to any other and what restrictions, affords, in the opinion of their lordships, another strong argument against the legality of the blockade in this case. If a partial, modified blockade is to be enforced against neutrals, justice seems to require that the modifications intended to be introduced should be notified to neutral states, and that they should be fully apprized what acts their subjects may or may not do. They cannot reasonably be exposed to the hardship of either abstaining from all commerce with a place in such a state of uncertain blockade, or of having their ships seized and sent to the country of the belligerent, in order to learn there, from the decision of its Court of Admiralty,

whether the conduct they have pursued is, or is not, protected by an equitable interpretation of an instrument in which they are not expressly included.

If these views of the law be correct, this ship cannot be considered to have had notice of any blockade of Riga at the time when she sailed for that port; for, in truth, no legal blockade was then in existence, and it would be hard to require a neutral to speculate on the probability, however great, of a legal blockade *de facto* being established at a future time, when he is not permitted to speculate on the chance of its discontinuance after he has once had notice of its existence.

Supposing, however, the blockade in this case to be open to no objections in point of law during the interval between the 15th of April and the 15th of May, it remains to be inquired whether the notice which this ship received of its existence was of such a character as to subject her to the penalty of confiscation for disregarding it. Notice has been imputed to the claimant in the court below from the alleged notoriety of the blockade on the 14th of May, at Elsinore, where the ship touched, and at Copenhagen, where the owner resided.

It is contended by the appellant that in a case of ingress of a port subject to a blockade only *de facto* of which there has not been any official notification, guilty knowledge cannot be inferred in an individual from general notoriety, and that a ship is always entitled under such circumstances to warning from the blockading squadron before she is exposed to seizure.

To this proposition their lordships are unable to accede. If a blockade *de facto* be good in law without notification, and a wilful violation of a known legal blockade be punishable with confiscation — propositions which are free from doubt, — the mode in which the knowledge has been acquired by the offender, if it be clearly proved to exist, cannot be of importance. Nor does there seem for this purpose to be much difference between ingress, in which a warning is said to be indispensable, and egress, in which it is admitted to be unnecessary.

The fact of knowledge is capable of much easier proof in the one case than in the other; but when once the fact is clearly proved, the consequences must be the same. The reasoning of the learned judge of the court below in this case, and the language of Lord Stowell in *The Adelaide* reported in the note to *The Neptunus*, 2 Rob. 111, and *The Hurtig Hane*, 3 Rob. 324, are conclusive upon this point.

But while their lordships are quite prepared to hold that the existence and extent of a blockade may be so well and so generally known that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron,

yet the fact, with notice of which the individual is so to be fixed, must be one which admits of no reasonable doubt. "Any communication which brings it to the knowledge of the party," to use the language of Lord Stowell in *The Rolla*, 6 Rob. 367, "in a way which could leave no doubt in his mind as to the authenticity of the information."

Again, the notice to be inferred from general notoriety, must be of such a character that if conveyed by a distinct intimation from a competent authority it would have been binding. The notice cannot be more effectual because its existence is presumed, than it would be if it were directly established in evidence. The notice to be inferred from the acts of a belligerent, which is to supply the place of a public notification, or of a particular warning, must be such as, if given in the form of a public notification, or of a particular warning, would have been legal and effectual.

For this purpose the notice of the blockade must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one; such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injustice to the commerce of neutrals. Accordingly, a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade, for afterwards attempting to enter the port which really is blockaded.

This was distinctly laid down by Lord Stowell in the case of *The Henrick and Maria*, 1 Rob. 148, where an officer of the blockading squadron had informed a neutral that all the Dutch ports were in a state of blockade, whereas the blockade was confined to Amsterdam. The ship was afterwards captured for an alleged attempt to enter Amsterdam, and Lord Stowell, in decreeing restitution, observed: "The notice is, I think, in point of authority, illegal; at the time when it was given there was no blockade which extended to all the Dutch ports. A declaration of blockade is a high act of sovereignty; and a commander of a King's ship is not to extend it. The notice is, also, I think, as illegal in effect as in authority: it cannot be said that such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election as to what other port of Holland he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress; and I am of opinion, that if the neutral had contravened the notice, he would not have been subject to condemnation."

The authority of this case is fully recognized by Dr. Lushington in the present case, who observes that such an administration of law in protecting the party misled, was most just.

Applying these principles to the evidence before them, their lordships can have no doubt that the master and owner in this case are to be fixed with notice of all that was publicly known at Copenhagen on the 14th of May, on the subject of the blockade; that it was known there that merchant vessels had been turned back from ports on the coast of Courland, and that a general impression prevailed that vessels seeking to enter Russian ports ran great risk of seizure; and that the owner in this case shared that impression, and that to this cause are to be attributed the want of proper ships' papers, which has been already alluded to, and the absence, on the further proof, of any affidavit on the part of the owner denying knowledge of the blockade.

But it is contended by the appellant that the impression which thus prevailed at Copenhagen (if, in fact, there existed any general impression), on the 14th of May was, and of necessity from the acts of the belligerent powers must have been, not that the ports of Libau, Windau, and the gulf of Riga were blockaded (which they really were), but that all the Russian ports in the Baltic were blockaded, which they certainly were not; and that a notice to be gathered from such erroneous impressions, was, on the principles already referred to, of no effect.[1]

It is clear, therefore, that the real state of the blockade could not have been known at Copenhagen on the 14th May, and that the only notice which the master could receive at that port, at that time, would be, that he must not sail for any of the Russian ports; a notice which, if he had received it from a British officer, he could not, on the principles already stated, be punished for disregarding.

The view which their lordships have taken of this part of the case makes it unnecessary for them to advert to the many other important points which were argued at their bar. They must advise a restitution of the ship (or rather the proceeds, for it appears to have been sold) and of the freight, but certainly without any costs or damages to the claimant. There will be simple restitution, without costs or expenses to either party.

THE "GERASIMO."

PRIVY COUNCIL, 1857.

(11 *Moore's Privy Council*, 88.)

A ship under Wallachian colors, with a cargo of corn belonging to the owners residing at Galatz in Moldavia, was seized for breach of

[1] The learned judge's examination of the evidence of knowledge in Cophenhagen of the blockade in question is omitted. — ED.

the Black Sea blockade, when coming out of the Sulina mouth of the Danube then in a state of blockade. At the time of the shipment of the cargo the Russians held possession of Moldavia and Wallachia, but such holding was with the express intention of not changing the national character, or incorporating that country with Russia. From the decree of condemnation in the High Court of Admiralty an appeal was taken to the Privy Council.[1]

The Right Hon. T. Pemberton Leigh:[2] —

Upon the present appeal the first question is, whether the owners of the cargo, in regard to this claim, are to be considered as alien enemies; and for this purpose it will be necessary to examine carefully both the principles of law which are to govern the case, and the nature of the possession which the Russians held of Moldavia at the time of this shipment.

Upon the general principles of law applicable to this subject there can be no dispute. The national character of a trader is to be decided for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the power under whose dominion he carries it on, and, of course, as an enemy of those with whom that power is at war. Nothing can be more just than this principle; but the whole foundation of it is, that the country in which the merchant trades is enemy's country.

Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, it is sufficient that the territory in question should be occupied by a hostile force, and subject, during its occupation, to the control of the hostile power, so far as such power may think fit to exercise control; or is it necessary that, either by cession or conquest, or some other means, it should, either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises?

It appears to their lordships that the first opposition cannot be maintained. It is impossible for any judge, however able and learned, to have always present to his mind all the nice distinctions by which general rules are restricted; and their lordships are inclined to think that if the authorities which were cited and so ably commented upon at this bar had been laid before the judge of the court below, he would,

[1] Short statement substituted for that of the report. — Ed.

[2] Only part of the opinion of the learned judge is given. — Ed.

perhaps, have qualified in some degree the doctrine attributed to him in the judgment to which we have referred.

With respect to the meaning of the term "dominion of the enemy," and what is necessary to constitute dominion, Lord Stowell has in several cases expressed his opinion. In the case of *The Fama*, 5 Rob. 115, he lays it down that in order to complete the right of property, there must be both right to the thing and possession of it; both *jus ad rem* and *jus in re*. "This," he observes, "is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, when a title is meant to be established for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, when the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion and under what laws they are to live."

The importance of this doctrine will appear when the facts with respect to the occupation of the principalities come to be examined.

That the national character of a place is not changed by the mere circumstance that it is in possession and under the control of a hostile force, is a principle held to be of such importance that it was acted upon by the lords of appeal in 1808, in the St. Domingo cases of the *Dart* and *Happy Couple*, when the rule operated with extreme hardship.

In the case of *The Manilla*, 1 Edw. 3, Lord Stowell gives the following account of those decisions: "Several parts of it (the island of St. Domingo) had been in the actual possession of insurgent negroes, who had detached them, as far as actual occupancy could do, from the mother country of France and its authority, and maintained, within those parts, at least, an independent government of their own. And although this new power had not been directly and formally recognized by an express treaty, the British Government had shown a favorable disposition towards it on the ground of its common opposition to France, and seemed to tolerate an intercourse that carried with it a pacific and even friendly complexion. It was contended, therefore, that St. Domingo could not be considered as a colony of the enemy. The Court of Appeal, however, decided, though after long deliberation, and with much expressed reluctance, that nothing had been done or declared by the British Government that could authorize a British tribunal to consider this island generally, or parts of it (notwithstanding a power hostile to France had established itself within it, to that degree of force, and with that kind of allowance from some other

states), as being other than still a colony of the enemy. There can be no doubt that the strict principle of the decision was correct."

On the other hand, when places in a friendly country have been seized by, and are in the possession of the enemy, the same doctrine has been held.

While Spain was in the occupation of France, and at war with Great Britain, the Spanish insurrection broke out, and the British Government issued a proclamation that all hostilities against Spain should immediately cease. Great part of Spain, however, was still occupied by French troops, and amongst others, the port of St. Andero. A ship called the *Santa Anna* was captured on a voyage, as it was alleged, to St. Andero, and Lord Stowell (1 Edw. 182) observed: "Under these public declarations of the state, establishing this general peace and amity, I do not know that it would be in the power of the court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under such circumstances as would justify the confiscation of neutral property."

The same principle has been acted upon in the courts of common law.

In the case of *Donaldson* v. *Thompson*, 1 Campb. 429, the Russian troops were in possession of Corfu and the other Ionian Islands, though the form of a republic was preserved, and it was contended that the islands must be considered as substantially part of the territory of the Russian Empire, if the Russian power was there dominant, and the supreme authority was in the Russian commander; or, if not, that the republic must be considered as a co-belligerent with Russia against the Porte, since the Emperor of Russia derived the same advantages, in a military point of view, from this occupation of the islands as if he had seized it hostilely, or the Ionian republic had been his ally in the war he was carrying on. Both these propositions, however, were repudiated by Lord Ellenborough; and afterwards, on a motion to set aside the verdict by the court of King's Bench, Lord Ellenborough observed: "Will any one contend that a government which is obliged to yield in any quarter to a superior force becomes a co-belligerent with the power to which it yields? It may as well be contended that neutral and belligerent mean the same thing." The same doctrine was afterwards laid down by the Court of King's Bench, in *Hagedorn* v. *Bell*, 1 Man. and Sel. 450, in the case of a trade carried on with Hamburg, which had been for several years, and at the time was in the military occupation of the French.

The distinction between hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by length of

time, is recognized by Lord Stowell in the case of *The Bolletta*, 1 Edw. 171. A question there arose whether certain property belonging to merchants at Zante, which had been captured by a British privateer, was to be considered as French or as Russian property, that question depending upon the national character of Zante at the time of the capture. Lord Stowell observes, p. 173: "On the part of the Crown it has been contended that the possession taken by the French was of a forcible and temporary nature, and that such possession does not change the national character of the country until it is confirmed by a formal cession, or by long lapse of time. That may be true, when possession has been taken by force of arms and by violence; but this is not an occupation of that nature. France and Russia had settled their differences by the treaty of Tilsit, and the two countries being at peace with each other, it must be understood to have been a voluntary surrender of the territory on the part of Russia." On this ground he held the territory to have become French territory, remarking in a subsequent passage of his judgment that this was a cession by treaty, and not a hostile occupation by force of arms, liable to be lost again the next day.

These authorities, with the other cases cited at the bar, seem to establish the proposition, that the mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies.

The ground now suggested is, that *The Gerasimo* was guilty of a break of blockade in coming out of the Danube when the mouths of that river were in a state of notified blockade. It is singular that if this were the ground of capture, no notice whatever of the blockade should have been continued in the affidavit originally prepared for Captain Powell to swear when the seizure was made, and the facts recent; that notice of it should be introduced for the first time in the affidavit made by him on the 30th of August, 1855; and that even in that late affidavit it is not stated that breach of blockade was the cause of the seizure.

There is no doubt, however, that breach of blockade, whether it was the cause of seizure or not, may be used as ground of condemnation, if the circumstances of the case bring it within the law.

What, then, were the circumstances? In the summer of 1854, the Russian forces in the Turkish territories were straitened for provisions. The allied fleets desired to prevent the importation of provisions up the Danube, and with that view the two admirals in command of the English and French fleets issued a proclamation, dated the 2d of June, 1854, in which they declared, to all whom it might concern, that they had established an effective blockade of the

Danube, in order to stop all transport of provisions to the Russian armies; they declared that this blockade included all those mouths of the Danube which communicate with the Black Sea, and they apprized all vessels of every nation that they will not be able to enter the river till further orders (*qu'ils ne pourront entrer dans ce fleuve jusqu'a nouvel ordre*).

On the 26th of June, the Russians forbade all export of cereals after the 2d of July. Any exportation of cereals, therefore, was in furtherance of the objects of the allies, and to the prejudice of the Russians. Could a Moldavian merchant imagine, if he had heard of this blockade, that he was to be liable to capture by the allies for exporting provsions, when the whole purpose of the blockade was declared to be to prevent their import?

But, by the rules of law, when a ship has entered a blockaded port before the blockade, she is entitled to come out again; and if she has a cargo taken on board before notice of the blockade, she is entitled to bring it out. The blockade of a port is *prima facie* evidence of the existence of the blockade to all who are within it, because the inhabitants who see the blockading ships off their coast cannot be well ignorant of the blockade. But this was no blockade of the port of Galatz, but a blockade of the mouths of the Danube, Galatz lying on its banks up the river, at a distance of 150 miles from its mouth.

In this case the ship had entered the river before the blockade; the cargo was taken on board on the 30th of June; and the ship must have sailed on or before the 2d of July; otherwise she would have been detained by the Russians. If she had no notice of the blockade, she was, on that general ground, entitled to bring out her cargo; if she had notice, she never could suppose that, according to the notification, she could be liable to capture; but if the case had been open to any suspicion, when the claimant has been deprived, by the wrongful act of the captors, of the opportunity of affording the explanations which the rules of law were intended to secure him.

Of the law applicable to the case, as it appears to their lordships, they cannot express their opinion better than in the language used by the learned judge of the court below, in the beginning of his judgment on the hearing before him. He says: "On the part of the claimants, a very long argument was addressed to the court, impugning the conduct of the captors, and charging them with having improperly brought the vessel to Constantinople. It has been further stated that there being no means of examining witnesses at Constantinople, great unnecessary delay had occurred, and that the captors were responsible for such delay and all the consequences. The court is not disposed to deny the truth and justice of the

principle contended for; on the contrary, I am clearly of the opinion, that if a delay in bringing to adjudication, and the non-examination of witnesses, arise, though it may be almost impossible for the government of the belligerent nation to prevent such occurrence, still that neutrals ought to be indemnified if injustice has been done them. The captors in the first instance, though they may be perfectly blameless, are responsible to the neutrals, and they must look to their own government for redress, if they have been compelled to make good any injury sustained by neutrals, in consequence of their fulfilling the commands which they dare not disobey. In many cases the captains of some of her Majesty's cruisers may have a discretion to release at once, but this may not be so in case of a blockade, when special orders may have been given to capture and detain."

In this statement of the principles of law, their lordships cordially concur. What claim the captor, Captain Powell, may have upon her Majesty's Government, it is not their duty to judge, nor have they any means of forming an opinion.[1] But as regards the claimants, his conduct appears to be without any excuse, and their lordships have no hesitation in advising restitution of the cargo, with cost and damages against the captors.

THE "NANCY."

PRIVY COUNCIL, 1809.

(1 *Acton*, 57.)

This was a case of several appeals from Vice-Admiralty Courts in America and the West Indies, condemning the ships and cargoes for a breach of the blockade of the island of Martinique, in the year 1804.

A ship, belonging to American citizens, sailed from New York for St. Pierre, in Martinique, unless the same should be blockaded. If the island should be blockaded, the master was to go to St. Thomas, whence he was to return to New York with a cargo purchased with the proceeds of the outward cargo.

[1] A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If these instructions are not strictly warranted by law, he is answerable in damages to any persons injured by their execution. *Little et al.* v. *Barreme et al.*, 1804, 2 Cr. 170, per Marshall, C. J. This case is distinguished in *Garland* v. *Davis*, 4 How. 131, 149, where it is held that public agents are not liable on contracts made for principals where no misfeasance is shown. — ED.

Arriving off Martinique the 29th of March, and finding no ship there, and not being given to understand that there existed any blockade at that time, he, in consequence of the vessel's having sprung a leak, repaired to the port of Trinity, in that island, to refit; from whence he sailed to St. Pierre, arriving the 3d of April.

While in the island he heard of no blockade, and no vessel of war had appeared off the island during his stay.

Having completed his cargo on the 15th, he sailed for New York, and was captured and carried into Halifax, in Nova Scotia, where the vessel and cargo were condemned as prize.

This statement was supported by the evidence of a passenger on board the vessel, by some of the crew, and by the tenor of a correspondence between persons in France, New York, and Martinique; which proved that the blockade was at that time removed, or left so far relaxed that no armed vessels had been seen off these ports during the period the vessel remained in the island.

For the captors it was contended that, although the blockading fleet had been dispatched to Surinam, a force had been left off the island to continue the blockade and apprise vessels of its existence. This appeared, even by the correspondence exhibited by the claimants, one of the letters admitting that a British fifty-gun ship continued off the island, and was now and then seen by the inhabitants.

Judgment. — Sir William Grant: —

The court held that, to constitute a blockade, the intention to shut up the port should not only be generally made known to the vessels navigating the seas in the vicinity, but that it was the duty of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island. In the present instance no such measures had been resorted to, and this neglect necessarily led neutral vessels to believe these ports might be entered without any risk. The periodical appearance of a vessel of war in the offing could not be supposed a continuation of a blockade, which the correspondence mentioned had described to have been previously maintained by a number of vessels; and with such unparalleled rigor, that no vessel whatever had been able to enter the island during its continuance. Their Lordships were therefore pleased to order that the ship should be restored, the proof of property being sufficient, but directed further proof as to the cargo claimed for the American citizens mentioned.

THE "OCEAN."

HIGH COURT OF ADMIRALTY, 1801.

(3 *C. Robinson*, 297.)

This was a question arising on the blockade of Amsterdam, respecting a cargo shipped for America at Rotterdam. It appeared that the persons ordering the shipment had ordered it of their agents at Amsterdam, as a shipment to be made *there*, subsequent to the date of the blockade of that place, but previous to *the blockade of the ports of* Holland. It was argued that in the intention of the claimants it was to be an exportation *actually from* Amsterdam, and that in effect the trade was the same, as the goods were ordered and *purchased* at Amsterdam, and were to be considered as part of the commerce of that place.

Judgment,—Sir W. SCOTT:—

"I am inclined to consider this matter favourably, as an exportation from Rotterdam only, the place in which the cargo becomes first connected with the ship. In what course it had travelled before that time, whether from Amsterdam at all, and if from Amsterdam, whether by land carriage or by one of their inland navigations, Rotterdam being the port of actual shipment, I do not think it material to inquire. On this view of the case it would be a little too rigorous to say, that an order for a shipment to be made at Amsterdam should be construed to attach on the owner, although not carried into effect. It has been said from the letter of the correspondent at Amsterdam, that the agents there had informed their correspondents in America that the blockade was not intended to prevent exportation: The representation of the enemy shipper could not have availed to exonerate the neutral merchants, if otherwise liable. Were this to be allowed, it would be in the power of the enemy to put an end to the blockade as soon as he pleased. If the general law is, that *egress* as well as ingress is prohibited by blockade, the neutral merchant is bound to know it; and if he entertains any doubt, he must satisfy himself by applying to the country imposing the blockade, and not to the party who has an interest in breaking it.

"It happens in this case, that the intended exportation did not take place. The only criminal act, if any, must have been the conveyance from Amsterdam to Rotterdam. It would be a little too much to say, that by that previous act the goods shipped at Rotter-

dam are affected. The legal consequences of a blockade must depend on the means of blockade; and on the actual or possible application of the blockading force. On the land side Amsterdam neither was nor could be affected by a blockading naval force. It could be applied only externally. The internal communications of the country were out of its reach, and in no way subject to its operation. If the exportation of goods from Rotterdam was at this time permitted, it could in no degree be vitiated by a previous inland transmission of them from the city of Amsterdam. Restored." [1]

[1] *Blockade.* — In the case of *The Circassian*, 1864, 2 Wall. 135, it was held that a blockade may be made effectual by batteries on shore, as well as by ships afloat, supported by a naval force sufficient to warn off innocent, and capture offending, vessels attempting to enter.

That a blockade regularly notified to neutral governments must, in the absence of clear proof of a discontinuance of it, be presumed to continue until notification is given by the blockading government of such discontinuance.

That a vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as prize from the time of sailing. See also the decision of Sir William Scott in the case of *The Columbia*, 1799, 1 C. Rob. 154.

See also other early cases before. Sir Wm. Scott: *The Stert*, 1801, 4 C. Rob. 65; *The Jonge Pieter*, 1801, 4 C. Rob. 79; *The Maria*, 1805, 6 C. Rob. 201; *The Lisette*, 1807, 6 C. Rob. 387; *The Julia*, 1811, 1 Dod. 169, note.

In *The Prize Cases*, 1862, 2 Black. 635 (*supra*), it was held, that it is a settled rule that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it commences. See also *The Vrouw Judith*, 1799, 1 C. Rob. 150. In this case a *de facto* blockade may be broken without notice, by egress. But persons entering a place under *de facto* blockade are entitled to warning.

The French rule in respect of a violation of blockade differs essentially from that of the United States and England. Notwithstanding that a blockade has been publicly proclaimed, a ship sailing for a blockaded port is entitled to a warning, entered upon her papers, and is only liable to seizure and condemnation when she subsequently attempts to enter or leave a blockaded port. See the cases of *La Louisa*, 1 Pistoye et Duverdy, 382; and *The Eliza Cornish*, id. 387.

As to the blockades established by the "orders in council," during the wars with Napoleon I., see Edwards' Admiralty Reports, 381–416, and the appendix to that volume. See also in the same volume, pp. 249–251, and 311–326.

For other cases on the subject of blockade, see *The Baigorry*, 1864, 2 Wall. 474; *The Cheshire*, 1865, 3 Wall. 231, 235; *The Admiral*, 1865, 3 Wall. 604; *The Peterhoff*, 1866, 5 Wall. 28; *The Dashing Wave*, 1866, 5 Wall. 170; *The Teresita*, 1866, 5 Wall. 180; *The Pearl*, 1866, 5 Wall. 574; *The Franciska*, Spinks, 111, and 10 Moore, 1855, P. C. 37; *The Henrick and Maria*, 1799, 1 C. Rob. 146. See the careful digest-note in Tudor, Mercantile Cases, 3d ed., 1019–1040. — Ed.

THE "HELEN."

High Court of Admiralty, 1865.

(*L. R.* 1 *Ad. and Ecc.* 1.)

In this case, the master sued for wages upon an agreement entered into between himself and the defendants, the owners of the *Helen*.

The defendants, in the fourth article of their answer, alleged that "the agreement was made and entered into for the purpose of running the blockade of the Southern ports of the United States of America, or one of them, and was and is contrary to law, and cannot be recognized or enforced by this Honourable Court."

Judgment, by Dr. Lushington:—

"This is a motion by the plaintiff to reject the fourth article of the defendant's answer. The parties in this cause are John Andrews Wardell, formerly the master of the *Helen*, plaintiff, and the Albion Trading Company, the owners of the ship, defendants. The master sues for wages (with certain premiums added), alleged to have been earned between July, 1864, and March, 1865. The answer states that according to the agreement as set forth by the defendants, the plaintiff has been paid all that was due to him. This part of the answer is not objected to. The fourth and last article is the one objected to. It alleges that the agreement was entered into for the purpose of breaking the blockade of the Southern States of America; that such an agreement is contrary to law, and cannot be enforced by this Court. In the course of the argument, the judgment in *Ex parte Chavasse re Grazebrook*, 34 L. J. (Bkr.), 17, was cited as governing the case; a judgment recently delivered by Lord Westbury whilst he was Lord Chancellor. The law there laid down is briefly stated, that a contract of partnership in blockade-running is not contrary to the municipal law of this country; and by the decree the partnership was declared valid, and the accounts ordered accordingly. It was admitted that this decision is directly applicable to the present case, a suit to recover wages according to a contract with respect to an intended adventure to break the blockade.

"That a decision of the Lord Chancellor is to be treated by this court with the greatest respect there can be no doubt, but is it absolutely binding?

"There are three tribunals whose decisions are absolutely binding upon the Court of Admiralty: 1. The House of Lords. 2. The Privy Council. 3. The Courts of Common Law when deciding upon the

construction of a statute. If a decision of any of these tribunals is cited, all that the Court of Admiralty can do is to inquire if the decision is applicable to the case. If so, then it is the duty of the Court to obey, whatever may be its own judgment.

"No other decisions are, I believe, absolutely binding on the Court. On the present occasion, no decision has been cited from the House of Lords or Privy Council. Whatever, therefore, may be the effect of the decisions of other tribunals, I am not relieved from the duty of reconsidering the whole question.

"An intimation has been given that this case will be carried to the Judicial Committee; if so, I apprehend that tribunal might be inclined to consider me remiss in my duty if I had omitted to form an independent judgment on the case, and to state it with my reasons. It is, I conceive, admitted on all hands, that the Court must enforce the agreement with the master, unless it is satisfied that such agreement is illegal by the municipal law of Great Britain. In order to prove this proposition, the defendants say that the agreement to break the blockade by a neutral ship is, on the part of all persons concerned, illegal according to the law of nations, and that the law of nations is a part of the municipal law of the land—*ergo*, this contract was illegal by municipal law.

"Now a good deal may depend on the sense in which the word 'illegal' is used. I am strongly inclined to think that the defendants attach to it a more extensive meaning than it can properly bear, or was intended to bear by those who used it. The true meaning, I think, is that all such contracts are illegal so far, that if carried out, they would lead to acts which might, under certain circumstances, expose the parties concerned to such penal consequences as are sanctioned by international law, for breach of blockade, or for the carrying of contraband. If so, the illegality is one of a limited character. For instance suppose a vessel after breaking the blockade completes her voyage home, and is afterwards seized on another voyage, the original taint of illegality—whatever it may have been—is purged, and the ship cannot be condemned; yet if the voyage was, *ab initio*, wholly and absolutely illegal, both by the law of nations and the municipal law, why should its successful termination purge the offence? Let me consider the relative situation of the parties. A neutral country has a right to trade with all other countries in time of peace. One of these countries becomes a belligerent, and is blockaded. Why should the right of the neutral be affected by the acts of the other belligerent? The answer of the blockading power is: 'Mine is a just and necessary war,' a matter which, in ordinary cases, the neutral cannot question, 'I must seize contraband, I must enforce blockade, to carry on the war.' In this

state of things there has been a long and admitted usage on the part of all civilized states—a concession by both parties, the belligerent and the neutral—a universal usage which constitutes the law of nations. It is only with reference to this usage that the belligerent can interfere with the neutral. Suppose no question of blockade or contraband, no belligerent could claim a right of seizure on the high seas of a neutral vessel going to the port of another belligerent, however essential to his interest it might be so to do.

"What is the usage as to blockade? There are several conditions to be observed in order to justify the seizure of a ship for breach of blockade. The blockade must be effectual and (save accidental interruption by weather) constantly enforced. The neutral vessel must be taken *in delicto*. The blockade must be enforced against all nations alike, including the belligerent one. When all the necessary conditions are satisfied, then, by the usage of nations, the belligerent is allowed to capture and condemn neutral vessels without remonstrance from the neutral state. It never has been a part of admitted common usage that such voyages should be deemed illegal by the neutral state, still less that the neutral state should be bound to prevent them; the belligerent has not a shadow of right to require more than universal usage has given him, and has no pretence to say to the neutral: 'You shall help me to enforce my belligerent right by curtailing your own freedom of commerce, and making that illegal by your own law which was not so before.' This doctrine is not inconsistent with the maxim that the law of nations is part of the law of the land. The fact is, the law of nations has never declared that a neutral state is bound to impede or diminish its own trade by municipal restriction. Our own Foreign Enlistment Act is itself a proof that to constitute transactions between British subjects, when neutral and belligerents, a municipal offence by the law of Great Britain, a statute was necessary. If the acts mentioned in that statute were in themselves a violation of municipal law, why any statute at all? I am now speaking of fitting out ships of war, not of levying soldiers, which is altogether a different matter. Then how stands the case upon authority? I may here say, that in principle, there is no essential difference whether the question of breach of municipal law is raised with regard to contraband or breach of blockade.

"Mr. Duer, 'Marine Insurance,' vol. I., lect. VII., is the only text-writer who maintains an opinion contrary to what I have stated to be the law. He maintains it with much ability and acuteness, but he stands alone. He himself admits that an insurance of a contraband

voyage is no offence against municipal law of a neutral country, according to the practice of all the principal states of continental Europe. In the American courts the question has been more than once agitated, but with the same result. In the case of *The Santissima Trinidad*, 7 Wheat., 340, Mr. Justice STORY says:—'It is apparent that, though equipped as a vessel of war, she (*The Independencia*) was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations. But there is nothing in our law or in the law of nations that forbids our citizens fron sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation.' * * *

"'There is no pretence for saying that the original outfit on the voyage was illegal.' Again, in *Richardson* v. *The Marine Insurance Company*, 6 Mass., 112, PARSONS, C. J., observes:—'The last class we shall mention is the transportation by a neutral of goods contraband of war to the country of either of the belligerent powers. And here, it is said, that these voyages are prohibited by the law of nations, which forms a part of the municipal law of every state, and, consequently, that an insurance on such voyages made in a neutral state is prohibited by the laws of that state, and therefore, as in the case of an insurance on interdicted commerce, is void. That there are certain laws which form a part of the municipal laws of all civilized states, regulating their mutual intercourse and duties, and thence called the law of nations, must be admitted: as, for instance, the law of nations affecting the rights and the security of ambassadors. But we do not consider the law of nations, ascertaining what voyages or merchandise are contraband of war, as having the same extent and effect. It is agreed by every civilized state that, if the subject of a neutral power shall attempt to furnish either of the belligerent sovereigns with goods contraband of war, the other may rightfully seize and condemn them as prize. But we do not know of any rule established by the law of nations that the neutral shipper of goods contraband of war, is an offender against his own sovereign, and liable to be punished by the municipal laws of his own country. When a neutral sovereign is notified of a declaration of war, he may, and usually does, notify his subjects of it, with orders to decline all contraband trade with the nations at war, declaring that, if they are taken in it, he cannot protect them, but not announcing the trade as

a violation of his own laws. Should their sovereign offer to protect them, his conduct would be incompatible with his neutrality. And as, on the one hand, he cannot complain of the confiscation of his subjects' goods, so, on the other, the power at war *does not impute to him* these practices of his subjects. A neutral merchant is not obliged to regard the state of war between other nations, but if he ships goods prohibited *jure belli*, they may be rightfully seized and condemned. It is one of the cases where two conflicting rights exist, which either party may exercise without charging the other with doing wrong. As the transportation is not prohibited by the laws of the neutral sovereign, his subjects may lawfully be concerned in it; and, as the right of war lawfully authorizes a belligerent power to seize and condemn the goods, he may lawfully do it.' Lastly, in *Seton, Maitland & Co.* v. *Low*, 1 Johnson, 5, Mr. Justice KENT says: —'I am of opinion that the contraband goods were lawful goods, and that whatever is not prohibited to be exported by the positive law of the country is lawful. It may be said that the law of nations is part of the municipal law of the land, and that by that law contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force; but the fact is that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers.' * * *

"In the English Courts the only case in which the point has been actually decided is the recent case before the Lord Chancellor, which I have already adverted to. With regard to the cases in Mr. Duer's book, *Naylor* v. *Taylor*, *Medeiross* v. *Hill*, it is enough to say that, in the view which the court eventually took of the facts, the question of law did not arise. It is in these two cases impossible to say with certainty what was the opinion of the judges at *nisi prius*.

"I cannot entertain any doubt as to the judgment I ought to pronounce in this case. It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that, to carry on trade with a blockaded port, is or ought to be a municipal offence by the law of nations. I must direct the 4th article of the answer to be struck out. I cannot pass by the fact that the attempt to introduce this novel doctrine comes from an avowed *particeps criminis*, who seeks to benefit himself by it. As he has failed on every ground, he must pay the cost of his experiment."

THE "ADULA."

SUPREME COURT OF THE UNITED STATES, 1899.

(176 *United States*, 361.)

Mr. Justice BROWN,[1] after stating the case, delivered the opinion of the court.

The rectitude of the decree of the District Court condemning the *Adula* as prize of war depends upon the existence of a lawful and effective blockade at Guantanamo, the knowledge of such blockade by those in charge of the vessel, and their intent in making the voyage from Kingston.

1. No blockade of Guantanamo was ever proclaimed by the President. A proclamation had been issued June 27, establishing a blockade of all ports on the southern coast of Cuba between Cape Frances on the west and Cape Cruz on the east, but as both Santiago and Guantanamo are to the eastward of Cape Cruz, they were not included. It appears, however, that blockades of Santiago and Guantanamo were established in the early part of June by order of Admiral Sampson, commander of the naval forces then investing the ports on the southern coast of Cuba, and were maintained as actual and effective blockades until after the capture of the *Adula*.

The legality of a simple or actual blockade as distinguished from a public or presidential blockade is noticed by writers upon international law, and is said by Halleck to be "constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence." Halleck, Int. L. ch. 23, sec. 10. A *de facto* blockade was also recognized as legal by this court in the case of *The Circassian*, 2 Wall. 135, 150, in which the question arose as to the blockade of New Orleans during the civil war. In delivering the opinion of the court, the chief justice observed: "There is a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case

[1] Statement of case omitted, likewise part of the opinion. — ED.

of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation." A like ruling was made by Sir William Scott in the case of *The Rolla*, 6 C. Rob. 364, which was the case of an American ship and cargo, proceeded against for the breach of a blockade at Montevideo, imposed by the British commander. It was argued, apparently upon the authority of *The Henrick and Maria*, 1 C. Rob. 123, that the power of imposing a blockade is altogether an act of sovereignty which cannot be assumed or exercised by a commander without special authority. But says the learned judge: "The court then expressed its opinion that this was a position not maintainable to that extent; because a commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority, delegated to him, as may be necessary to provide for the exigencies of the service upon which he is employed. On stations in Europe, where government is almost at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different. But in distant ports of the world it cannot be disputed, I conceive, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy, as against the enemy himself, for the immediate purpose of reduction." See also *The Johanna Maria*, Deane on Blockades, 86.

In view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, we think it was competent for Admiral Sampson to establish a blockade there and at Guantanamo as an adjunct to such operations. Indeed, it would seem to have been a necessity that restrictions should be placed upon the power of neutrals to carry supplies and intelligence to the enemy as they would be quite sure to do if their ships were given free ingress and egress from these harbors. While there could be no objections to vessels carrying provisions to the starving insurgents, if their destination could be made certain, the probabilities were that such provisions carried to a beleaguered port, would be immediately seized by the enemy and used for the sustenance of its soldiers. The exigency was one which rendered it entirely prudent for the commander of the fleet to act, without awaiting instructions from Washington.

But it is contended that at the time of the capture, the port of Guantanamo was completely in the possession and control of the United States, and therefore that the blockade had been terminated. It appears, however, that Guantanamo is eighteen miles from the mouth of Guantanamo Bay. Access to it is obtained either by a

small river emptying into the upper bay, or by rail from Caimanera, a town on the west side of the upper bay. It seems that the *Marblehead* and the *Yankee* were sent to Guantanamo on June 7; entered the harbor and took possession of the lower bay for the use of American vessels; that the *Panther* and *Yosemite* were sent there on the 10th, and on the 12th the torpedo boat *Porter* arrived from Guantanamo with news of a land battle, and from that time the harbor was occupied by naval vessels, and by a party of marines who held the crest of a hill on the west side of the harbor near its entrance, and the side of the hill facing the harbor. But the town of Guantanamo, near the head of the bay, was still held by the Spanish forces, as were several other positions in the neighborhood. The campaign in the vicinity was in active progress, and encounters between the United States and Spanish troops were of frequent occurrence.

In view of these facts we are of opinion that, as the city of Guantanamo was still held by the Spaniards, and as our troops occupied only the mouth of the bay, the blockade was still operative as against vessels bound for the city of Guantanamo. Here again the case of *The Circassian*, 2 Wall. 135, is decisive.[1] The *Circassian* was captured May 4, 1862, for an attempted violation of the blockade of New Orleans. The city, including the ports below it on the Mississippi, was captured during the last days of April, and military possession of the city taken on May first. It was held that neither the capture of the forts nor the military occupation of the city terminated the blockade, upon the ground that it applied, not to the city alone, but controlled the port, which included the whole parish of New Orleans, and lay on both sides of the Mississippi, and all the ports on that river and on the lakes east of the city. The following language of the chief justice is equally pertinent to this case: "Now, it may be well enough conceded that a continuous and complete possession of

[1] While it is true that the case of the *Circassian*, *supra*, "is decisive," it is submitted that the authority of that case has been badly shaken, if not wholly destroyed. Such intense dissatisfaction was created by the judgment of the Supreme Court that this matter was submitted to the American and British Claims Commission appointed by the Treaty of May 8, 1871, between the United States and Great Britain (Art. XII.). The commission made awards in favor of all the claimants. 4 Moore, Int. Arb. 3911–3923.

It may not be out of place to quote the following passage referring to the judgment in the *Circassian*: "The truth is that the feeling of the country was deep and strong against England, and the judges, as individual citizens, were no exception to that feeling. Besides, the court was not then familiar with the law of blockade" (Letter of Mr. Justice Nelson, dated Aug. 4, 1873, to Wm. B. Lawrence and printed in Law Magazine and Review, Fourth series, Vol. III. 31). It should be said, however, that such criticism does not apply to Mr. Justice Nelson, as his dissenting opinions sufficiently show. See also Hall's Int. Law, 694, note 3. — Ed.

the city and the port, and of the approaches from the Gulf, would make a blockade unnecessary, and would supersede it. But, at the time of the capture of the *Circassian*, there had been no such possession. Only the city was occupied, not the port, much less the district of country commercially dependent upon it, and blockaded by its blockade. Even the city had been occupied only three days. It was yet hostile; the rebel army was in the neighborhood; the occupation, limited and recent, was subject to all the vicissitudes of war. Such an occupation could not at once, of itself, supersede or suspend the blockade. It might ripen into a possession which would have that effect, and it did; but at the time of the capture it operated only in aid and completion of the naval investment." The occupation of the city terminates a blockade because, and only because, it supersedes it, and if a vessel be bound to a port or place beyond, which is still occupied by the enemy, the occupation of the mouth of the harbor does not necessarily terminate the blockade as to such places.

Granting the existence of a lawful and sufficient blockade at Guantanamo, its legal effect was a closing of the port, and an interdiction of the entrance of all vessels of whatever nationality or business. It is well described by Sir William Scott in *The Vrouw Judith*, 1 C. Rob. 126, 128, "as a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this court means to apply, that a neutral ship departing can only take away a cargo *bonâ fide* purchased and delivered, before the commencement of the blockade. If she afterwards takes on board a cargo it is a fraudulent act and a violation of the blockade." It is also said by Phillimore, 3 Int. Law, 383, that "the object of a blockade is to prevent exports as well as imports, and to cut off all communication of commerce with the blockaded place." The sailing of a vessel with a premeditated intent to violate a blockade is *ipso facto* a violation of the blockade, and renders the vessel subject to capture from the moment she leaves the port of departure. *Yeaton* v. *Fry*, 5 Cranch, 335; *The Circassian*, 2 Wall. 135; *The Frederick Molke*, 1 C. Rob. 72; *The Columbia*, 1 C. Rob. 130; *The Neptunus*, 2 C. Rob. 110; Wheaton on Captures, 196. If a master have actual notice of a blockade, he is not at liberty even to approach the blockaded port for

the purpose of making inquiries of the blockading vessels, since such liberty could not fail to lead to attempts to violate the blockade under pretext of approaching the port for the purpose of making such inquiries. *The Admiral*, 3 Wall. 603; *The Prize Cases*, 2 Black, 635, 677; Duer on Ins. 661; *The Cheshire*, 3 Wall. 231; *The James Cook*, Edwards, 261; *The Josephine*, 3 Wall. 83; *The Spes*, 5 C. Rob. 76; *The Betsey*, 1 C. Rob. 332; *The Neptunus*, 2 C. Rob. 110; *The Little William*, 1 Acton, 141, 161; *Sperry* v. *Delaware Ins. Co.*, 2 Wash. C. C. 243. If there be any distinction in this particular between a proclaimed blockade and an actual blockade by a naval commander, it does not aid the *Adula* in view of the admitted fact that she was informed by the *Vixen* that the port was under the control of the United States military forces, and that the war ships were visible before she entered the bay.

In this connection we are cited by counsel for the *Adula* to a change in the law said to have been effected by the adhesion of this government, at the beginning of the war, to the declaration of Paris abolishing privateering. This supposed change apparently rests upon an extract from a French treatise upon international law by Pistoye and Duverdy, Vol. I. p. 375, in which it is said that by the modern law, in consequence of the declaration of Paris, a vessel must be notified to depart from the blockaded port before she can be captured, and that the contrary rule was the result of the doctrine of the British Orders in Council during the Napoleonic wars, which is now given up by that country. It is also said that "the old rule was that it was a breach of blockade to enter upon a voyage to the blockaded port. This rule is now changed, because neutrals are obliged only to respect effective blockades. It may well be that a blockade of which official notice has been given is not an effective blockade, or it may be that a blockade which has been established by a sufficient force may have ceased to exist. Neutrals then have the right to begin a voyage to a blockaded port in order to see if the blockade still continues. They are only guilty when, while the blockade continues, they actually endeavor to break it."

We cannot, however, accept this opinion as overruling in any particular the prior decisions of this court in the cases above cited, to the effect that a departure for a blockaded port with intent to violate the blockade renders the vessel liable to seizure. When Congress has spoken upon this subject it will be time enough for this court to act. We cannot change our rulings to conform to the opinions of foreign writers as to what they suppose to be the existing law upon the subject.

We have not overlooked in this connection the provision contained

in Art. 18 of Jay's treaty of 1794, to the effect that "whereas, it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed, that every vessel so circumstanced, may be turned away from such port or place, but she shall not be detained nor her cargo, if not contraband, confiscated, unless after notice she shall again attempt to enter." *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch, 185. Waiving the question whether this clause of Jay's treaty was abrogated by the war of 1812, and accepting it as a correct exposition of the law of nations, it applies only to vessels which have sailed for a hostile port or place without knowing that the same is either besieged, blockaded, or invested. The whole case against the *Adula* depends upon the question whether those in charge of her knew before she left Kingston that Santiago and Guantanamo were blockaded. If they did, the treaty does not apply. If they did not, they are entitled to the benefit of this principle of international law. In the case of the *Maryland Ins. Co.* v. *Woods*, 6 Cranch, 29, in which it was held that the vessel could not be placed in the situation of one having notice of the blockade until she was warned off, the decision was placed upon the express ground that orders had been given by the British Government, and communicated to our government, "not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them." This order was treated by the court as a mitigation of the general rule so far as respected blockades in the West Indies.

From all the testimony in the case it appears very clear:

[That the *Adula* belonged to a British corporation, the Atlas Steamship Company, flew the British flag, and prior to the Spanish-American war was engaged in general trade between Kingston and other ports on the coast of Jamaica, in connection with other steamers of the same line from New York, and from time to time had made voyages to Cuban ports.]

That Guantanamo was actually and effectively blockaded by orders of Admiral Sampson from June 7 until after the capture of the *Adula*;

That the *Adula* was chartered to a Spanish subject for a voyage to Guantanamo, Santiago, or Manzanillo, for the purpose of bringing away refugees, and that such voyage was primarily, at least, a commercial one for the personal profit of the charterer. During such charter she was to a certain extent *pro hâc vice*, a Spanish vessel, and a notice to Solis of the existence of the blockade was a notice to the

vessel. *The Ranger*, 6 C. Rob. 126; *The Yonge Emilia*, 3 C. Rob. 52; *The Napoleon*, Blatch. Prize Cases, 296. The fact of her sailing under a Spanish passport — in fact, an enemy's license — is not devoid of significance. Indeed, we have in several cases regarded this as sufficient ground for condemnation. *The India*, 8 Cranch, 181; *The Aurora*, 8 Cranch, 203; *The Hiram*, 1 Wheat. 440; *The Ariadne*, 2 Wheat. 143. This passport gave the *Adula* authority to enter the Cuban ports and take away refugees, and it is a circumstance worthy of notice that it could not be found when the vessel was captured. Solis acknowledged its existence, but made no effort to account for its loss;

Both Solis himself and the *Adula* had been previously engaged in similar enterprises to the coast of Cuba, and were chargeable with notice, not only of war between the United States and Spain, but with the fact of military and naval operations upon the southern coast of Cuba;

The fact of such war, that the object of it was the expulsion of the Spanish forces from Cuba, and that military and naval operations were being carried on by us with that object in view, must have been matters of common knowledge in Kingston, as well as the fact that the commerce with the southern ports of Cuba was likely to be interrupted, and that all intercourse with such ports would become dangerous in consequence of such war;

While the mission of the *Adula* was not an unfriendly one to this government, she was not a cartel ship, privileged from capture as such, but one employed in a commercial enterprise for the personal profit of the charterer, and only secondarily, if at all, for the purpose of humanity. Her enterprise was an unlawful one, in case a blockade existed, and both Solis and the master of the *Adula* were cognizant of this fact. The direction of the commanding officer of the *Vixen*, which overhauled the *Adula* off Guantanamo, to enter the harbor, cannot be construed as a permission to violate the blockade, as such permission would not be within the scope of his authority. *The Hope*, 1 Dod. 226; *The Amado*, Newb. 400; *The Joseph*, 8 Cr. 451; *The Benito Estenger*, *post* 568.

That upon arrival off Santiago the blockading fleet was plainly visible, and we think there is a preponderance of evidence to the effect that both Solis and the master of the *Adula* knew of the actual blockade, that it was generally known in Kingston before she sailed, and that the *Adula* was chargeable with a breach of it, notwithstanding the letter of instructions from Mr. Forwood to Captain Yeates. As the blockade had been in existence since June 7, it is scarcely possible that, in the three weeks that elapsed before the *Adula* sailed,

it should not have been known in Kingston, which was only a day's trip from the southern coast of Cuba, and with which it appears to have been in frequent communication. This probability is confirmed by the direct testimony of the sailor Morris, that it was matter of common talk in Kingston. The testimony of Solis, that he did not know "officially" that Guantanamo was blockaded, by which we are to understand that it had not been officially proclaimed, is perfectly consistent with a personal knowledge of the actual fact. His statement seems to be little more than a convenient evasion. Upon the principle already stated his knowledge was the knowledge of the ship.

We think the facts herein stated outweigh the general statement of the officers that they had not heard of the blockade.

3. There was no error in denying the motion of the claimant to take further proofs. It appears from the opinion of the court that "the hearing upon the proceedings for condemnation was upon the evidence afforded by the examination of the captured crew taken upon standing interrogatories, the ship's papers, and other evidence of a documentary character found upon the ship by the captors. This was done in conformity to the established rule in prize cases."

The motion to take further proof was made upon the affidavit of Robert Gemmell, the New York agent of the company, the statement of W. P. Forwood, the Kingston agent, annexed thereto, as well as his own affidavit and exhibits, and upon the counter testimony of Anderson, Ellenberg, and Gill taken *de bene esse*. Upon the hearing of this motion the court considered the allegations of Forwood, attached to Gemmell's affidavit, as if Forwood had testified upon depositions regularly taken, giving due weight to the same in connection with other evidence in the case; and was of opinion that the evidence as it stood was not susceptible of any satisfactory explanation; and comparing the proof proposed to be brought forward with that already in the case, came to the conclusion that the legal effect of the facts before the court could not be varied by the explanation offered. The motion was denied. In considering this case we have also given effect to these affidavits, and have come to the conclusion that, if they are to be taken as true, and the further proofs, if taken, would support them, they would not change our opinion with respect to the affirmance of the decree.

If an examination of the ship's papers and of the crew, taken *in preparatorio*, upon which the cause is first heard in the District Court, make a case for condemnation, the order for further proof is, as stated in *The Gray Jacket*, 5 Wall. 342, 368, always made with

extreme caution, and only where the interests of justice clearly require it. If the ship's papers and the testimony of the crew do not justify an acquittal, it is improbable that a defence would be established by further proof; and as the interest of all parties require that prize causes be quickly disposed of, it is only where the testimony *in preparatorio* makes a case of grave doubt, that the court orders the taking of further proofs. *The Pizarro*, 2 Wheat. 227; *The Amiable Isabella*, 6 Wheat. 1, 77; Benedict's Adm'y, sec. 512 *a*; Story on Prize Courts, 17.

It was said by Sir William Scott in *The Sarah*, 3 C. Rob. 330, that "it has seldom been done except in cases where there has appeared something in the original evidence, which lays a suggestion for prosecuting the inquiry farther. In such case the court has allowed it; but when the matter is foreign, and not connected with the original evidence of the cause, it must be under very peculiar circumstances indeed that the court will be induced to accede to such an application; because, if remote suggestions were allowed, the practice of the court would be led away from the simplicity of prize proceedings, and there would be no end to the accumulation of proof that would be introduced in order to support arbitrary suggestions."

These remarks are especially pertinent to the offer of further proof that, while Solis owed allegiance to the Queen of Spain, yet, that he left Cuba soon after the war broke out, took no part in the hostilities, but on the contrary had done all in his power while he remained in Cuba to assist citizens of the United States residing there; had sided with the natives of Cuba, and was desirous that a government should be established in the island under the auspices of the United States. As was observed in the very satisfactory opinion of the district judge in this case, this evidence was altogether irrelevant to the case of the *Adula*, and was, to a certain extent, a contradiction of his testimony before the prize commissioners that he was a loyal subject of Spain, bore a Spanish passport, and carried a bill of health *viséd* by the Spanish consul at Kingston. It would throw the whole practice in prize cases into confusion if the testimony, taken *in preparatorio*, when the facts are fresh in the minds of the witnesses, were subject to be contradicted by the same witnesses after its weak points had been developed. It was said by Mr. Justice Story in *The Pizarro*, 2 Wheat. 227: "Nor should the captured crew have been permitted to be re-examined in court. They are bound to declare the whole truth upon the first examination; and if they fraudulently suppress any material facts, they ought not to be indulged with an opportunity to disclose what they please, or to give color to their former statements after counsel has been taken, and they know the pressure of the cause.

Public policy and justice equally point out the necessity of an inflexible adherence to this rule."

Upon the whole, we think the decree of the District Court was correct, and it is therefore Affirmed.[1]

THE "OLINDE RODRIGUES."

SUPREME COURT OF THE UNITED STATES, 1898.

(174 *United States*, 510.)

Mr. Chief Justice FULLER delivered the opinion of the court.

We are unable to concur with the learned district judge in the conclusion that the blockade of the port of San Juan at the time this steamship was captured was not an effective blockade.

To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but on the contrary, that the test is whether the blockade is practically effective, and that that is a question, though a mixed one, more of fact than of law.

The fourth maxim of the Declaration of Paris (April 16, 1856) was: "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Manifestly this broad definition was not intended to be literally applied. The object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances.

This was put by Lord Russell in his note to Mr. Mason of February 10, 1861, thus: "The Declaration of Paris was in truth directed against what were once termed 'paper blockades;' that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing or the like. * * * The interpretation, therefore, placed by her Majesty's Government on the declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. * * *

[1] Dissenting opinion of SHIRAS, J., concurred in by GRAY, WHITE, and PECKHAM, JJ., omitted. See *The Newfoundland*, 1899, 176 U. S. 97, for case in which intent to run the blockade of Havana during the same war was held insufficiently proved. — ED.

It is proper to add, that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that declaration." Hall's Int. Law, § 260, p. 730, note.

The quotations from the Parliamentary debates, of May, 1861, given by Mr. Dana in note 233 to the eighth edition of Wheaton on International Law, afford interesting illustrations of what was considered the measure of effectiveness; and an extract is also there given from a note of the Department of Foreign Affairs of France of September, 1861, in which that is defined: "Forces sufficient to prevent the ports being approached without exposure to a certain danger."

In *The Mercurius*, 1 C. Rob. 80, 84, Sir William Scott stated: "It is said, this passage to the Zuyder Zee was not in a state of blockade; but the ship was seized immediately on entering it; and I know not what else is necessary to constitute blockade. The powers who formed the armed neutrality in the last war, understood blockade in this sense; and Russia, who was the principal party in that confederacy, described a place to be in a state of blockade, when it is dangerous to attempt to enter into it."

And in *The Frederick Molke*, 1 C. Rob. 86, the same great jurist said: "For that a legal blockade did exist, results necessarily from these facts, as nothing farther is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice, or prohibition given to the party."

Such is the settled doctrine of the English and American courts and publicists, and it is embodied in the second of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492: "A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous."

Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent.

In *The Franciska*, 2 Spinks, 128, Dr. Lushington, in passing on the question whether the blockade imposed on the port of Riga was an effective blockade, said: "What, then, is an efficient blockade, and how has it been defined, if, indeed, the term 'definition' can be applied to such a subject? The one definition mentioned is, that

egress or entrance shall be attended with evident danger; another, that of Chancellor Kent (1 Kent's Com. 146), is, that it shall be apparently dangerous. All these definitions are and must be, from the nature of blockades, loose and uncertain; the maintenance of a blockade must always be a question of degree, — of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention, nor, indeed, more opposed to my notions of the law of nations, than any relaxation of the rule that a blockade must be efficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone."

"It is impossible," says Mr. Hall (§ 260), "to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of a blockade. It is for the prize courts of the belligerent to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be non-existent; or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition."

In *The Hoffnung*, 6 C. Rob. 112, 117, Sir William Scott said: "When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months, without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, and which introduces therefore a very different train of presumptions, in favor of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed." And undoubtedly a blockade may be so inadequate, or the negligence of the belligerent in maintaining it may be of such a character, as to excuse neutral vessels from the penalties for its violation. Thus in the case of an alleged breach of the blockade of the island of Martinique, which had been carried on by a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island, it was held that their withdrawal was a neglect which "necessarily led neutral vessels to believe these ports might be entered without incurring any risk." *The Nancy*, 1 Acton, 57, 59.

But it cannot be that a vessel actually captured in attempting to

enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected.

As we hold that an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position cannot be maintained that one modern cruiser though sufficient in fact is not sufficient as matter of law.

Even as long ago as 1809, in *The Nancy*, 1 Acton, 63, where the station of the vessel was sometimes off the port of Trinity and, at others, off another port more than seven miles distant, it was ruled that: "Under particular circumstances a single vessel may be adequate to maintain the blockade of one port and co-operate with other vessels at the same time in the blockade of another neighboring port;" although there Sir William Grant relied on the opinion of the commander on that station that the force was completely adequate to the service required to be performed.

The ruling of Dr. Lushington in *The Franciska*, above cited, was to that effect, and the text-books refer to other instances.

The learned district judge, in his opinion, refers to the treaty between France and Denmark of 1742, which provided that the entrance to a blockaded port should be closed by at least two vessels or a battery on shore; to the treaty of 1760 between Holland and the Two Sicilies prescribing that at least six ships of war should be ranged at a distance slightly greater than gunshot from the entrance; and to the treaty between Prussia and Denmark of 1818, which stipulated that two vessels should be stationed before every blockaded port; but we do not think these particular agreements of special importance here, and, indeed, Ortolan, by whom they are cited, says that such stipulations cannot create a positive rule in all cases even between the parties, "since the number of vessels necessary to a complete investment depends evidently on the nature of the place blockaded." 2 Ortolan, 4th ed., 330, and note 2.

Nor do we regard Sir William Scott's judgment in *The Arthur*, 1814, 1 Dodson, 423, 425, as of weight in favor of claimants. In effect the ruling sustained the validity of the maintenance of blockade by a single ship, and the case was thus stated: "This is a claim made by one of his Majesty's ships to share as joint-captor in a prize taken in the river Ems by another ship belonging to his Majesty, for a breach of the blockade imposed by the order in council of the 26th of April, 1809. This order was, among others, issued in the way of retaliation for the measures which had been previously adopted by

the French Government against the commerce of this country. The blockade imposed by it is applicable to a very great extent of coast, and was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships and forming as it were an arch of circumvallation around the mouth of the prohibited port. There, if the arch fails in any one part, the blockade itself fails altogether; but this species of blockade, which has arisen out of the violent and unjust conduct of the enemy, was maintained by a ship stationed anywhere in the neighborhood of the coast, or, as in this case, in the river itself, observing and preventing every vessel that might endeavor to effect a passage up or down the river."

Blockades are maritime blockades, or blockades by sea and land; and they may be either military or commercial, or may partake of the nature of both. The question of effectiveness must necessarily depend on the circumstances. We agree that the fact of a single capture is not decisive of the effectiveness of a blockade, but the case made on this record does not rest on that ground.

We are of opinion that if a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, that is sufficient, since thereby the blockade is made practically effective.

What then were the facts as to the effectiveness of the blockade in the case before us?

In the proclamation of June 27, 1898, occurs this paragraph: "The United States of America has instituted and will maintain an effective blockade of all the ports on the south coast of Cuba, from Cape Frances to Cape Cruz, inclusive, and also of the port of San Juan, in the island of Porto Rico." Proclamation No. 11, 30 Stat. 34. The blockade thus announced was not of the coast of Porto Rico, but of the port of San Juan, a town of less than 25,000 inhabitants, on the northern coast of Porto Rico, with a single entrance. From June 27 to July 14, 1898, the *Yosemite*, a merchant ship converted into an auxiliary cruiser, blockaded the port. Her maximum speed was fifteen and one-half knots; and her armament ten 5-inch rapid firing guns, six 6-pounders, two 1-pounders, with greatest range of three and one-half miles. While the *Yosemite* was blockading the port she ran the armed transport *Antonio Lopez* aground six miles from San Juan; gave a number of neutral vessels official notice of the blockade; warned off many from the port; and on the 5th of July, 1898, wrote into the log of the *Olinde Rodrigues*, off San Juan, the official warning of the blockade of San Juan. On July 14 and thereafter the port was blockaded by the armored cruiser *New Orleans*, whose maximum speed was twenty-two knots, and her armament six 6-inch breech-

loading rifles, four 4.7-inch breech-loading rifles, ten 6-pounders, four 1.5-inch guns, corresponding to 3-pounders; four 3-pounders in the tops; four 37-millimetre automatic guns, corresponding to 1-pounders. The range of her guns was five and one-half sea miles or six and a quarter statute miles. If stationary, she could command a circle of thirteen miles in diameter; if moving, at maximum speed, she could cover in five minutes any point on a circle of seventeen miles diameter; and in ten minutes any point on a circle of nineteen miles diameter; her electric search-lights could sweep the sea by night for ten miles distance; her motive power made her independent of winds and currents; in these respects and in her armament and increased range of guns she so far surpassed in effectiveness the old-time war ships that it would be inadmissible to hold that even if a century ago more than one ship was believed to be required for an effective blockade, therefore this cruiser was not sufficient to blockade this port.

Assuming that the *Olinde Rodrigues* attempted to enter San Juan, July 17, there can be no question that it was dangerous for her to do so, as the result itself demonstrated. She had had actual warning twelve days before; no reason existed for the supposition that the blockade had been pretermitted or relaxed; her commander had no right to experiment as to the practical effectiveness of the blockade, and, if he did so, he took the risk; he was believed to be making the attempt, and was immediately captured. In these circumstances the vessel cannot be permitted to plead that the blockade was not legally effective.

But we are considering the blockade of the port of San Juan and not of the coast, and while additional vessels to cruise about the island might be desirable in order that the blockade should be positively effective, we think it a sufficient compliance with the obligations of international law if the blockade made egress or ingress dangerous in fact, and that the suggestions of a zealous American naval commander, in anticipation of a conflict of armed forces before San Juan, that the blockade should be brought to the highest efficiency in a military as well as a commercial aspect, cannot be allowed to have the effect of showing that the blockade which did exist was, as to this vessel, ineffective in point of law.

Such being the situation, and the evidence of the ship's officers being explicit that the vessel was on her way to St. Thomas and had no intention of running into San Juan, the decree in her favor must be affirmed on the merits, unless the record elsewhere furnishes evidence sufficient to overcome the conclusion reasonably deducible from the facts above stated.

Counsel for the government insist that the intention of the *Olinde*

to run the blockade is necessarily to be inferred from the possession of these bills of health and their alleged concealment and destruction. Doubtless the spoliation of papers, and, though to a less degree, their concealment, is theoretically a serious offence, and authorizes the presumption of an intention to suppress incriminating evidence, though this is not an irrebuttable presumption.

In *The Pizarro*, 2 Wheat. 227, 241, the rule is thus stated by Mr. Justice Story: "Concealment, or even spoliation of papers is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance, and to justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of a denial of farther proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply."

The evidence of evil intent must be clear and convincing before a merchant ship belonging to citizens of a friendly nation will be condemned. And on a careful review of the entire evidence, we think we are not compelled to proceed to that extremity.

But, on the other hand, we are bound to say that, taking all the circumstances together and giving due weight to the evidence on behalf of the captors, probable cause for making the capture undoubtedly existed; and the case disclosed does not commend this vessel to the favorable consideration of the court.

Probable cause exists where there are circumstances sufficient to warrant suspicion though it may turn out that the facts are not sufficient to warrant condemnation. And whether they are or not cannot be determined unless the customary proceedings of prize are instituted and enforced. *The Adeline*, 4 Cranch, 244, 285; *The Thompson*, 3 Wall. 155. Even if not found sufficient to condemn, restitution will not necessarily be made absolutely, but may be decreed conditionally as each case requires, and an order of restitution does not prove lack of probable cause. *The Adeline*, *supra*; *Jennings* v. *Carson*, 4 Cranch, 2, 28, 29.

In the statement of Sir William Scott and Sir John Nicholl, transmitted to Chief Justice Jay, then Minister to England, by Sir William Scott, Sept. 10, 1794, "The general principles of proceeding

in prize causes, in British Courts of Admiralty, and of the measures proper to be taken when a ship and cargo are brought in as prize within their jurisdictions," are set forth as laid down in an extract from a report made to the King in 1753 "by Sir George Lee, then judge of the Prerogative Court, Dr. Paul, his Majesty's advocate-general, Sir Dudley Rider, his Majesty's attorney-general, and Mr. Murray (afterwards Lord Mansfield), his Majesty's solicitor-general;" and many instances are given where in the enforcement of the rules "the law of nations allows, according to the different degrees of misbehavior, or suspicion, arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant, in case of acquittal and restitution." Wheaton on Captures, Appendix, 309, 311, 312; Pratt's Story's Notes, p. 35.

In *The Appollon*, 9 Wheat. 362, 372, Mr. Justice Story said: "No principle is better settled in the law of prize than the rule that probable cause will not merely excuse, but even, in some cases, justify a capture. If there be probable cause, the captors are entitled, as of right, to an exemption from damages; and if the case be of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law of prize proceeds yet farther, and gives the captors their costs and expenses in proceeding to adjudication."

Section 4639 of the Revised Statutes contemplates that, under circumstances, all costs and expenses shall remain charged on the captured vessel though she be restored, and this court has repeatedly held that damages and costs will be denied where there was probable cause for seizure, and that sometimes costs will be awarded to the captors. *The Venus*, 5 Wheat. 127; *The Thompson*, 3 Wall. 155; *The Springbok*, 5 Wall. 1; *The Dashing Wave*, 5 Wall. 170; *The Sir William Peel*, 5 Wall. 517; *The Peterhoff*, 5 Wall. 28, 61, 62.

In *The Dashing Wave*, Chief Justice Chase said: "We think it was the plain duty of a neutral claiming to be engaged in trade with Matamoras, under circumstances which warranted close observation by the blockading squadron, to keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the boundary line as to repel, so far as position could repel, all imputation of intent to break the blockade. He had no right to take, voluntarily, a position in the immediate presence of the blockading fleet, from which merchandise might be so easily introduced into the blockaded region. We do not say that neglect of duty, in this respect, on the part of the brig, especially in the absence of positive evidence that the neglect was wilful, calls for condemnation; but we cannot doubt that under

the circumstances described, capturing and sending in for adjudication was fully warranted."

In *The Springbok*, the ship was restored but costs and damages were not allowed because of the misconduct of the master.

In *The Peterhoff*, payment of costs and expenses by the ship was decreed as a condition of restitution. *The Peterhoff* was captured by the United States vessel of war *Vanderbilt* on suspicion of intent to run the blockade and of having contraband on board. Her captain refused to take his papers to the *Vanderbilt*, and, in addition, papers were destroyed and a package was thrown overboard. *The Peterhoff* was searched, and it is stated in the opinion: "The search led to the belief on the part of the officers of the *Vanderbilt* that there was contraband on board, destined to the enemy. This belief, it is now apparent, was warranted. It was therefore the duty of the captors to bring *The Peterhoff* in for adjudication, and clearly they are not liable for the costs and expenses of doing so." The court then commented on the destruction of papers, and the throwing overboard of the package, in regard to which it was unable to credit the representations of the captain, but in view of the other facts in the case, did not extend the effect of the captain's conduct and the incriminating circumstances to condemnation.

The case before us falls plainly within these rulings. This vessel had gone into San Juan on July 4, although the captain had heard of the blockade at St. Thomas, but he says he had not been officially notified of it; he telegraphed to the consul at San Juan to know, and was answered that they had received no official notice from Washington that the port was blockaded; he also heard while in San Juan that "it would be blockaded some future time, but that was not officially." The vessel was boarded and warned by the *Yosemite* on July 5, and the warning entered on her log. This imposed upon her the duty to avoid approaching San Juan, on her return, so nearly as to give just cause of suspicion, yet she so shaped her course as inevitably to invite it.

When the *New Orleans* succeeded the *Yosemite*, her commander was informed of the facts by his predecessor, and knew that whatever the right of the *Olinde Rodrigues* to be in those waters, she could not lawfully place herself so near the interdicted port as to be able to break the blockade with impunity. But when he sighted her the ship was on a course to all appearance directly into that port, and steadily pursuing it. And when he signalled, the *Olinde Rodrigues* apparently did not obey, but seemingly persisted on her course, and that course would in a few moments have placed her within the range of the guns of Morro and of the shore batteries. In fact, when the

shot was fired she was within the range of the Morro's guns. The evidence is overwhelming that she did not change her course until after the shot was fired, even though she may have stopped as soon as she saw the signal. The turning point into the Culebra or Virgin Passage was perhaps forty miles to the eastward, and while she could have passed the port of San Juan on the course she was on, it would have been within a very short distance. The disregard of her duty to shun the port and not approach it was so flagrant that the intention to break the blockade was to be presumed, though we do not hold that that was a presumption *de jure*.

The ship's log was not produced until three hours after she was boarded, and it now appears that the papers furnished the boarding officer, "said to be all the ship's papers," did not include two Spanish bills of health in which San Juan was entered as the vessel's destination. These were destroyed after the ship reached Charleston, and were, therefore, in the ship's possession when the other papers were delivered. Had they been shown, as they should have been, can it be denied that they would have furnished strong corroboration of criminal intent? Or that their destruction tended to make a case of "strong and vehement suspicion"?

The entire record considered, we are of opinion that restitution of the *Olinde Rodrigues* should be awarded, without damages, and that payment of the costs and expenses incident to her custody and preservation, and of all costs in the cause except the fees of counsel, should be imposed upon the ship.

The decree of the District Court will be so modified, and

As modified affirmed.

Mr. Justice McKenna dissented on the ground that the evidence justified condemnation.[1]

[1] If a ship has contracted guilt by a breach of blockade, the offence is not discharged until the end of the return voyage. *The Wren*, 1867, 6 Wall. 582. — Ed.

SECTION 45. — RULE OF THE WAR OF 1756.

THE "IMMANUEL."

HIGH COURT OF ADMIRALTY, 1799.

(2 *C. Robinson*, 186.)

This was the case of an asserted Hamburg ship, taken 14th August, 1799, on a voyage from Hamburg to St. Domingo, having in her voyage touched at Bordeaux, where she sold part of the goods brought from Hamburg, and took a quantity of iron stores and other articles for St. Domingo. A question was first raised as to the property of the ship and cargo; 2dly, supposing it to be neutral property, whether a trade from the mother country of France to St. Domingo, a French Colony, was not an illegal trade, and such as would render the property of neutrals engaged in it liable to be considered as the property of enemies, and subject to confiscation?

Judgment. — Sir WM. SCOTT: — "Upon the breaking out of a war, it is the right of neutrals to carry on their *accustomed trade*, with an exception of the particular cases of a trade to blockaded places, or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search; in which case however they are entitled to freight and expenses. I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and endangered; in the nature of human connections it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than fully balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But without reference to accidents of the one kind or other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable.

"Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title, than by the success of the one belligerent against the other, and at the

expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking.

"What is the colonial trade *generally speaking?* It is a trade generally shut up to the exclusive use of the mother country, to which the colony belongs, and this to a double use;—that, of supplying a market for the consumption of native commodities, and the other of furnishing to the mother country the peculiar commodities of the colonial regions; to these two purposes of the mother country, the general policy respecting colonies belonging to the states of Europe, has restricted them. With respect to other countries, generally speaking, the colony has no existence; it is possible that indirectly and remotely such colonies may affect the commerce of other countries. * * *

"Upon the interruption of a war, what are the rights of belligerents and neutrals respectively regarding such places? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea: Such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended they must fall to the belligerent of course—and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent; and say, 'True it is, you have, by force of arms forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening, which the prevalence of your arms alone has affected; supplies shall be sent and their products shall be exported; you have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interest, but for the common benefit of others.'

"Upon these grounds, it cannot be contended to be a *right* of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his

colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war, it is a measure not of French councils, but of British force.

"Upon these and other grounds, which I shall not at present enumerate, an instruction issued at an early period for the purpose of preventing the communication of neutrals with the colonies of the enemy, intended, I presume, to be carried into effect on the same footing, on which the prohibition had been legally enforced in the war of 1756; a period when, Mr. Justice Blackstone observes, the decisions on the law of nations proceeding from the Court of Appeals, were known and revered by every state in Europe.

"Condemned."[1]

THE "EMANUEL."

High Court of Admiralty, 1799.

(1 *C. Robinson*, 296.)

This was a case respecting the allowance of freight and expenses to a neutral ship, taken carrying on the coasting trade of the enemy.

Judgment by Sir Wm. Scott: —

"Now the ground upon which it is contended that the freight is not due to the proprietors of this vessel, is, that she is a Danish ship employed in the transmission of Spanish goods, from one Spanish port to another, and so carrying on the coasting-trade of that country. In our own country it has long been the system, that the coasting-trade should only be carried on by our own navigation. I observe, that in all the rage of novel experiment that has dictated the commercial regulations of France in its new condition, this policy is held sacred; it stands enacted, by a decree 21st Sept., 1793, that no goods, the growth or manufacture of France, shall be carried from one French port to another in foreign ships under pain of confiscation.—The same policy has directed the commercial system of other European countries; in the ordinary state of affairs, no indulgence is generally permitted to the ships of most other countries to carry on the coasting trade. I think therefore the *onus probandi* does at least lie on that side; and always makes it necessary to be shown by the claimants, that such a trade was not a mere indulgence, and a temporary relaxation of the coasting system of the state in ques-

[1] Compare *The Wilhelmina*, 1801, 4 C. Rob. append. p. 4, and see digest-note in Tudor, Mercantile Cases, 3d ed., 972–980. — Ed.

tion; but that it was a common and ordinary trade, open to the ships of any country whatever. * * *

"As to the coasting trade (supposing it to be a trade not usually opened to foreign vessels), can there be described a more effective accommodation that can be given to an enemy during a war than to undertake it for him during his own disability?"[1]

Section 46. — Continuous Voyages.

THE "WILLIAM."

Lords on Appeal in Prize Cases, 1806.

(5 *C. Robinson*, 385.)

This was a question on the continuity of a voyage in the colonial trade of the enemy, brought by appeal from the Vice-Admiralty Court at Halifax, where the ship and cargo, taken on a destination to Bilboa in Spain, and claimed on behalf of Messrs. W. and N. Hooper of Marblehead in the state of Massachusetts, had been condemned 17th July, 1800.

Among the papers was a certificate from the collector of the customs, "that this vessel had entered and landed a cargo of cocoa belonging to Messrs. W. and N. Hooper, and that the duties had been secured agreeable to law, and that the said cargo had been reshipped on board this vessel bound for Bilboa.

Judgment,—Sir William Grant:—

"The question in this case is, whether that part of the cargo which has been the subject of further proof, and which, it is admitted, was, at the time of the capture, going to Spain, is to be considered as coming directly from Laguira within the meaning of his Majesty's instructions. According to our understanding of the law, it is only from those instructions that neutrals derive any right of carrying on with the colonies of our enemies, in time of war, a trade from which they were excluded in time of peace. The instructions had not permitted the direct trade between the hostile colony and its mother country, but had, on the contrary ordered all vessels engaged in it to be brought in for lawful adjudication; and what the present claimants accordingly maintain, is not that they could carry the produce of Laguira directly to Spain; but that they were not so carrying the cargo in question, inasmuch as the voyage in which it

[1] The above is only an extract from the opinion. — Ed.

was taken was a voyage from North America, and not directly from a colony of Spain.

"What then, with reference to this subject, is to be considered as a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest and shortest course, in which the voyage could be performed, would change its denomination, and make it cease to be a direct one within the intendment of the instructions.

"Nothing can depend on the degree or the deviation—whether it be of more or fewer leagues, whether towards the coast of Africa, or towards that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change, because a party may choose arbitrarily by the ship's papers, or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done: Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process?

"Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm, that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible, but when it is discovered, it is according to the truth and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those acts have been attended with trouble and expence cannot alter their quality or their effect. The trouble and expence may weigh as circumstances of evidence, to shew the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be found to accept as a substitute for the observance of the

law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them.—The landing of the cargo, the entry at the custom-house, and the payment of such duties as the law of the place requires, *are necessary ingredients* in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they are *mere voluntary ceremonies*, which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage which he has resolved to continue, the appearance of being broken by an importation, which he has resolved not really to make.

"Now, what is the case immediately before us? The cargo in question was taken on board at Laguira. It was at the time of the capture proceeding to Spain; but the ship had touched at an American port. The cargo was landed and entered at the custom-house, and a bond was given for the duties to the amount of 1,239 dollars. The cargo was re-shipped, and a debenture for 1,211 dollars by way of drawback was obtained. All this passed in the course of a few days. The vessel arrived at Marblehead on the 29th of May; on that day the bond for securing the duties was given. On the 30th and 31st the goods were landed, weighed, and packed. The permit to ship them is dated the 1st of June, and on the 3d of June the vessel is cleared out as laden, and ready to proceed to sea. We are frequently obliged to collect the purpose from the circumstances of the transaction. The landing thus almost instantaneously followed by the re-shipment, has little appearance of having been made with a view to actual importation; but it is not upon inference that the conclusion in this case is left to rest. The claimants, instead of showing that they really did import their cargo, have, in their attestation, stated the reasons which determined them not to import it. They say, indeed, that when they ordered it to be purchased, 'it was with the single view of bringing it to the United States, and that they had no intention or expectation of exporting it in the *said schooner* to Spain.' Supposing that from this somewhat ambiguous statement we are to collect that their original intention was to have imported this cargo into America, with a view only to the American market, yet their intention had been changed before the arrival of the vessel. For they state that *in the beginning of May*

they had received accounts of the prices of cocoa in Spain, which satisfied them that it would sell much better there than in America, and that they had therefore determined to send it to the Spanish market. Nothing is alleged to have happened between the landing of the cargo and its re-shipment, that could have the least influence on their determination. It was not in that short interval that American prices fell, or that information of the higher prices in Spain had been received. Knowing beforehand the comparative state of the two markets, they neither tried nor meant to try that of America, but proceeded with all possible expedition to go through the forms which have been before enumerated. If the continuity of the voyage remains unbroken, it is immaterial whether it be by the prosecution of an original purpose to continue it, as in the case of the *Essex*, or, as in this case, by the relinquishment of an original purpose to have brought it to a termination in America. It can never be contended, that an intention to import once entertained is equivalent to importation. And it would be a contradiction in terms to say that by acts done after the original intention has been abandoned, such original intention has been carried into execution. Why should a cargo, which there was to be no attempt to sell in America, have been entered at an American custom-house, and voluntarily subjected to the payment of any, even the most trifling duty? Not because importation was, or in such a case could be intended, but because it was thought expedient that something should be done, which in a British Prize Court might pass for importation. Indeed, the claimants seem to have conceived that the inquiry to be made here was, *not*, whether the importation was real or pretended, but whether the pretence had assumed a particular form, and was accompanied with certain circumstances which by some positive rule were, in all cases, to stand for importation, or to be conclusive evidence of it. * * *

"But supposing that we had uniformly held that payment of the import duties furnished conclusive evidence of importation, would there have been any inconsistency or contradiction in holding that the mere act of giving a bond for an amount of duties, of which only a very insignificant part was ever to be paid, could not have the same effect as the actual payment of such amount? The further proof in the *Essex* first brought distinctly before us the real state of the fact in this particular. It has been already mentioned that we had called for an account of the drawbacks, if any, that had been received. This produced the information that although the duties secured amounted to 5,278 dollars, yet a debenture was immediately afterwards given for no less than 5,080 dollars; so that on that

valuable cargo no more than 198 dollars would be ultimately payable, which sum is said to be more than compensated for the advantage arising from the negotiability of the debenture. * * *

"The consequence is, that the voyage was illegal, and that the sentence of condemnation must be affirmed."

THE "STEPHEN HART."

U. S. District Court of So. New York, 1863.

(*Blatchford's Prize Cases*, 387.)

The schooner *Stephen Hart* was captured, as lawful prize of war, by the United States vessel of war *Supply*, on the 29th of January, 1862, off the southern coast of Florida, about 25 miles from Key West, and about 82 miles from Point de Yeacos, in Cuba, bound ostensibly from London to Cardenas, in Cuba, with a cargo of munitions of war and army supplies.

Betts, J.: —

"Many of the principle questions involved in the present case, and in the cases of the *Springbok* and the *Peterhoff*, are alike; and, as the conclusion at which the court has arrived in all of those cases is to condemn the vessels and their cargoes, I shall announce, in this case, the leading principles of public law which lead to a condemnation in all the cases.

"On behalf of the libellants, it is urged in this case, 1st. That the *Stephen Hart* and her cargo were enemy's property when the voyage in question was undertaken, and when the capture was made; 2d. That the schooner was laden with articles contraband of war, destined for the aid and use of the enemy, and on transportation by sea to the enemy's country at the time of capture; 3d. That, with a full knowledge, on the part of the owner of the vessel and of the owners of her cargo, that the ports of the enemy were under blockade, the vessel and her cargo were despatched from a neutral port with an intention, on the part of the owners of each, that in violation of the blockade, both the vessel and her cargo should enter a port of the enemy.

"On the part of the claimants, it is maintained, 1st. That the transportation of all articles, including arms and munitions of war, between neutral ports in a neutral vessel, is lawful in time of war; 2d. That if a neutral vessel, with a cargo belonging to neutrals, be in fact on a voyage from one neutral port to another, she cannot be

seized and condemned as lawful prize, although she be laden with contraband of war, unless it be determined that she was actually destined to a port of the enemy upon the voyage on which she was seized, or unless she is taken in the act of violating a blockade.

"It is insisted, on the part of the claimants, that the *Stephen Hart* was, at the time of her capture, a neutral vessel, carrying a neutral cargo from London to Cardenas—both of them being neutral ports—in the regular course of trade and commerce. On the other side it is contended that the cargo was composed exclusively of articles contraband of war, destined, when they left London, to be delivered to the enemy, either directly, by being carried into a port of the enemy in the *Stephen Hart* or by being trans-shipped at Cardenas to another vessel; that Cardenas was to be used merely as a port of call for the *Stephen Hart*, or as a port of trans-shipment for her cargo; that the vessel and her cargo are equally involved in the forbidden transaction; and that the papers of the vessel were simulated and fraudulent in respect to her destination and that of her cargo. A condemnation is not asked if the cargo was in fact neutral property, to be delivered at Cardenas for discharge and general consumption or sale there, but is only claimed if the cargo was really intended to be delivered to the enemy at some other place than Cardenas, after using that port as a port of call or of trans-shipment, so as to thus render the representations contained in the papers of the vessel false and fraudulent as to the real destination of the vessel and her cargo.

"It would scarcely seem possible that there could be any serious debate as to the true principles of public law applicable to the solution of the questions thus presented; and, indeed, the law is so well settled as to make it only necessary to see whether the facts in this case bring the vessel and her cargo within the rules which have been laid down by the most eminent authorities in England and in this country.

"The principles upon which the government of the United States, and the public vessels acting under its commission, have proceeded, during the present war, in arresting vessels and cargoes as lawful prize upon the high seas, are very succinctly embodied in the instructions issued by the Navy Department on the 18th of August, 1862, to the naval commanders of the United States, and which instructions are therein declared to be a recapitulation of those theretofore from time to time given. The substance of those instructions, so far so they are applicable to the present case, is, that a vessel is not to be seized 'without a search carefully made, so far as to render it reasonable to believe that she is engaged in carrying contraband of war for or to the insurgents, and to their ports di-

rectly or indirectly by trans-shipment, or otherwise violating the blockade.'

"The main feature of these instructions, so far as they bear upon the questions involved in this case, is but an application of the doctrine in regard to captures laid down by the government of the United States at a very early day. In an ordinance of the Congress of the Confederation, which went into effect on the 1st of February, 1782, 5 Wheaton, Appendix, p. 120, it was declared to be lawful to capture and to obtain condemnation of all 'contraband goods, wares, and merchandises, to whatever nations belonging, although found in a neutral bottom, *if destined for the use of an enemy*.'

"The soundness of these principles, and the fact that the law of nations, as applicable to cases of prize, has been observed and applied by the government of the United States and its courts during the present war, was fully recognized by Earl Russell, her Britannic Majesty's principal secretary of state for foreign affairs, in his remarks made in the House of Lords on the 18th of May last. Earl Russell there stated that the judgments of the United States prize courts, which had been reported to her Majesty's government during the present war, did not evince any disregard of the established principles of international law; that the law officers of the Crown, after an attentive consideration of the decisions which had been laid before them, were of opinion that there was no rational ground of complaint as to the judgments of the American prize courts; and that the law of nations in regard to the search and seizure of neutral vessels had been fully and completely acknowledged by the government of the United States. On the same occasion Earl Russell remarked: 'It has been a most profitable business to send swift vessels to break or run the blockade of the southern ports, and carry their cargoes into those ports. There is no municipal law in this or any country to punish such an act as an offence. I understand that every cargo which runs the blockade and enters Charleston is worth a million of dollars, and that the profit on these transactions is immense. It is well known that the trade has attracted a great deal of attention in this country from those who have a keen eye to such gains, and that vessels have been sent to Nassau in order to break the blockade at Charleston, Wilmington, and other places, and carry contraband of war into some of the ports of the Southern States.' He added: 'I certainly am not prepared to declare, nor is there any ground for declaring, that the courts of the United States do not faithfully administer the law; that they will not allow evidence making against the captors; or that they are likely to give decisions founded, not upon the law, but upon their

own passions and national partialities.' He also said, that in a case of simulated destination—that is, a vessel pretending that she is going to Nassau, when she is in reality bound to a port of the enemy—the right of seizure exists.

"The then solicitor-general of England (Sir Roundell Palmer) stated, in the House of Commons, on the 29th of June last, referring to the cases of the *Dolphin* and the *Pearl*, decided by the district court for the southern district of Florida (those vessels having been captured while ostensibly on voyages from Liverpool to Nassau, and it having been held by the court that the intention of the owners of the vessels was that they should only touch at Nassau, and then go and break the blockade at Charleston), that 'if the owners imagined that the mere fact of the vessel touching at Nassau when on such an expedition exonerated her, they were very much mistaken;' that the principles of the judgment in the case of the Dolphin 'were to be found in every volume of Lord Stowell's decisions;' that it was well known to everybody that there was a large contraband trade between England and America by way of Nassau; that it was absurd to pretend to shut their eyes to it; and that the trade with Nassau and Matamoras had become what it was in consequence of the war.

"The Foreign Office of Great Britain, in a letter to the owner of the *Peterhoff*, on the 3d of April last, announced as its conclusion, after having communicated with the law officers of the Crown, that the government of the United States has no right to seize a British vessel *bona fide* bound from a British port to another neutral port, unless such vessel attempts to touch at, or has an intermediate or contingent destination to, some blockaded port or place, or is a carrier of contraband of war destined for the enemy of the United States; that her Majesty's government, however, cannot, without violating the rules of international law, claim for British vessels navigating between Great Britain and such neutral ports any general exemption from the belligerent right of visitation by the cruisers of the United States, or proceed upon any general assumption that such vessels may not so act as to render their capture lawful and justifiable; that nothing is more common than for those who contemplate a breach of blockade or the carriage of contraband, to disguise their purpose by a simulated destination and by deceptive papers; and that it has already happened, in many cases, that British vessels have been seized while engaged in voyages apparently lawful, and have been afterwards proved in the prize courts to have been really guilty of endeavoring to break the blockade, or of carrying contraband to the enemy of the United States.

"The cases of the *Stephen Hart*, the *Springbok*, the *Peterhoff*, and

the *Gertrude* illustrate a course of trade which has sprung up during the present war, and of which this court will take judicial cognizance, as it appears from its own records and those of other courts of the United States as well as from public reputation. Those neutral ports have suddenly been raised from ports of comparatively insignificant trade to marts of the first magnitude. Nassau and Cardenas are in the vicinity of the blockaded ports of the enemy, while Matamoras is in Mexico, upon the right bank of the Rio Grande, directly opposite the town of Brownsville, in Texas. The course of trade, in respect to Nassau and Cardenas, has been generally to clear neutral vessels, almost always under the British flag, from English ports for those places, and, using them merely as ports either of call or of trans-shipment, to either resume new voyages from them in the same vessels, or to trans-ship their cargoes to fleet steamers, with which to run the blockade, the cargoes being composed, in almost all cases, more or less, of articles contraband of war. The character and course of this trade, and its sudden rise, are very properly commented upon in a despatch from the Secretary of State of the United States to Lord Lyons, of the 12th of May, 1863.

"The broad issue upon the merits in this case is, whether the adventure of the *Stephen Hart* was the honest voyage of a neutral vessel from one neutral port to another neutral, carrying neutral goods between those two ports only, or was a simulated voyage, the cargo being contraband of war, and being really destined for the use of the enemy, and to be introduced into the enemy's country by a breach of blockade by the *Stephen Hart*, or by trans-shipment from her to another vessel at Cardenas. It is conceded in the argument of the leading counsel for the claimants that if the property was owned by the enemy, and was fraudulently on its way to the enemy as neutral property, it was enemy's property, and was liable to capture, no matter whence it came or whither it was bound; and that, if the vessel were really intending and endeavoring to run the blockade, the property was liable to capture, no matter to whom it belonged or what was its character; but that if it was neutral property, in *lawful commerce*, it was safe from seizure.

"The question whether or not the property laden on board of the *Stephen Hart* was being transported in the business of lawful commerce, is not to be decided by merely deciding the question as to whether the vessel was documented for, and sailing upon, a voyage from London to Cardenas. The commerce is in the destination and intended use of the property laden on board of the vessel, and not in the incidental, ancillary, and temporary voyage of the vessel, which may be but one of many carriers through which the property

is to reach its true and original destination. If this were not the rule of the prize law, a very wide door would be opened for fraud and evasion. A cargo of contraband goods, really intended for the enemy, might be carried to Cardenas in a neutral vessel sailing from England with papers which, upon their face, import merely a voyage of the vessel to Cardenas, while in fact, her cargo, when it left England, was destined by its owners to be delivered to the enemy by being trans-shipped at Cardenas into a swifter vessel. And such, indeed, has been the course of proceeding in many cases during the present war. * * *

"The law seeks out the truth, and never, in any of its branches, tolerates any such fiction as that under which it is sought to shield the vessel and her cargo in the present case. If the guilty intention, that the contraband goods should reach a port of the enemy, existed when such goods left their English port, that guilty intention cannot be obliterated by the innocent intention of stopping at a neutral port on the way. If there be, in stopping at such port, no intention of trans-shipping the cargo, and if it is to proceed to the enemy's country in the same vessel in which it came from England, of course there can be no purpose of lawful neutral commerce at the neutral port by the sale or use of the cargo in the market there; and the sole purpose of stopping at the neutral port must merely be to have upon the papers of the vessel an ostensible neutral terminus for the voyage.

"If, on the other hand, the object of stopping at the neutral port be to trans-ship the cargo to another vessel to be transported to a port of the enemy, while the vessel in which it was brought from England does not proceed to the port of the enemy, there is equally an absence of all lawful neutral commerce at the neutral port; and the only commerce carried on in the case is that of the transportation of the contraband cargo from the English port to the port of the enemy, as was intended when it left the English port. This court holds that, in all such cases, the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any part of such voyage or transportation be unlawful, it is unlawful throughout; and that the vessel and her cargo are subject to capture; as well before arriving at the first neutral port at which she touches after her departure from England, as on the voyage or transportation by sea from such neutral port to the port of the enemy. * * *

"There must, therefore, be a decree condemning both vessel and cargo." [1]

[1] Cases involving the same principles are *The Bermuda*, 1865, 3 Wall. 514; the *Springbok*, 1866, 5 Wall. 1; the *Peterhoff*, 1866, 5 Wall. 28, and others. The judgment of Betts, J., in the *Stephen Hart* was subsequently briefly affirmed by the

Section 47. — Visit and Search: Neutral Property on the High Seas.

THE "MARIA."

High Court of Admiralty, 1799.

(1 *C. Robinson*, 340.)

This was the leading case of a fleet of Swedish merchantmen, carrying pitch, tar, hemp, deals, and iron to several ports of France, Portugal, and the Mediterranean; and taken, January, 1798, sailing under convoy of a ship of war, and proceeded against for resistance of visitation and search by British cruisers.

Judgment. — Sir W. Scott:[1] —

"This being the actual state of facts, it is proper for me to examine, 2dly, what is their legal state, or, in other words, to what considerations they are justly subject, according to the law of nations; for which purpose I state a few principles of that system of law which I take to be incontrovertible.

"1st, That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that *free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uni-

Supreme Court, 1865, 3 Wall. 559, and it (Betts' judgment) is on the whole the clearest and most forcible statement of the principles and the circumstances involved in these cases, to be found in the reports. Compare L'Affaire du Doelwijk, 1896, 24 Journal de Droit Int. Privé, 268-298. The doctrine of continuous voyages is generally condemned, 7 Revue de Droit Int. 236-260; 14 id. 328-331; Bonfils, Droit des Gens, §§ 1666-1667 (literature in note); Fauchille, Du Blocus Maritime, 1882, pp. 333-346; 2 Rivier, 432-434. — Ed.

[1] Only so much of the judgment is given as applies to general principles. — Ed.

form and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature, is in the state of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly coexist.

"2dly, That the authority of the Sovereign of the neutral country being interposed in any manner of mere force cannot *legally* vary the rights of a lawfully-commissioned belligerent cruiser; I say *legally*, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this Court, I have no right to entertain. All that I assert is, that *legally* it cannot be maintained, that if a Swedish commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorized by that law to obstruct the exercise of that right with respect to the merchant-ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit, (as in some late instances they have agreed,) by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of na-

tions upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. I am not ignorant, that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorized speculations it is not necessary for me to descant: the law and practice of nations (I include particularly the practice of Sweden when it happens to be belligerent) give them no sort of countenance; and until that law and practice are new-modelled in such a *way* as may surrender the known and ancient rights of some nations to the present convenience of other nations, (which nations may perhaps REMEMBER to *forget* them, when they happen to be themselves belligerent,) no reverence is due to them; they are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of capture in war—that is, in other words, to change the nature of hostility, as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilized states, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expence of the constant hazard of the harmony of states, and of the lives and safeties of innocent individuals.

"3dly, That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. For the proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public law." See Book III., c. vii., sect. 114.[1]

[1] For decisions on Visit and Search in time of peace, see *Le Louis*, 1817, 2 Dods. 210, *ante*, 352; *R.* v. *Serva and others*, 1845, 1 Den. Cr. Cas. 104, with cases there cited; *The Antelope*, 1825, 10 Wheat. 119. See also the note to *The Maria* in Tudor, Mercantile Cases, 3d ed., 914-920. — ED.

THE SCHOONER "NANCY."

United States Court of Claims, 1892.

(27 *Court of Claims*, 99.)

Davis, J., delivered the opinion of the court:[1] —

The *Nancy*, sailing from Baltimore to Port à Paix in the year 1797, was in June captured by an English vessel of war, taken into St. Nicholas Môle and there detained. She sailed then (under constraint) for Jéremie, and there took in a cargo of coffee. Thereafter the schooner left Jéremie, under convoy bound back to St. Nicholas Môle, with intention there to join a convoy for the United States, but before arrival at the Môle, and while under convoy, she was captured by the French, August 2d; in due course she was condemned as prize, and, with her cargo, was lost to the owners.

The substantial ground for condemnation is found in the fact that when the *Nancy* was captured she was actually under convoy. The nature or nationality of the convoy is not shown, but the history of the time forces the presumption that it was an English armed vessel, either public, or, what is more likely, private. Jéremie was in possession of the English, so was the Môle. The *Nancy* was forced to take an English privateer as convoy from the Môle to Jéremie, and in the latter port it is more than improbable that she would have found any armed vessel to escort her back to the Môle which did not fly the flag of Great Britain. The record being silent upon this point, we are forced to assume that when captured she was under English protection.

One question of law alone, then, is presented for our decision: Was the condemnation legal of a neutral vessel laden with neutral cargo captured when under enemy convoy? There is, so far as we have been able to discover, no judicial decision in the United States upon the question presented by this record and which we now must consider and determine.

A case much cited in discussions of the right of search is the *Nereide*, 9 Cranch, 389, but there the court decide only that neutral property is not tainted when laden upon an armed belligerent; and the principle governing such a case is thus stated by Chief Justice Marshall (p. 432).

"The general rule, the incontestable principle, is that a neutral has a right to employ a belligerent carrier. He exposes himself thereby to capture and detention, but not to condemnation."

[1] The statement of facts is omitted as they sufficiently appear in the judgment. —Ed.

In the later case of *The Atalanta*, 3 Wheat. p. 409, Mr. Justice Johnson, speaking of the distinction observed between neutral goods laden upon belligerent vessels and neutral vessels under convoy, made the following suggestions:

"A convoy is an association for a hostile object. In undertaking it, a nation spreads over the merchant vessel an immunity from search which belongs only to a national ship; and by joining a convoy every individual ship puts off her pacific character and undertakes for the discharge of duties which belong only to the military marine and adds to the numerical, if not the real, strength of the convoy. If, then, the association be voluntary, the neutral, in suffering the fate of the whole, has only to regret his own folly in wedding his fortune to theirs; or, if involved in the aggression or the opposition of the convoying vessels, he shares the fate which the leader of his own choice either was or would have been made liable to in case of capture."

And further (p. 424):

"Resistance, either real or constructive, by a neutral carrier is, with a view to the law of nations, unlawful."

The *Atalanta*, like the *Nereide*, was an armed British vessel, carrying neutral cargo. No question as to the effect of belligerent convoy was involved in either case, and Mr. Justice Johnson's remarks can only be regarded as illustrative. They, however, gain great force from the fact that in the case of the *Nereide* Mr. Justice Story (who dissented) wrote an opinion upon neutral duties which has always attracted general attention, and which is to-day found fully cited in the text-books, both those by our own authors and those written by citizens or subjects of other nations; in fact, one accepted authority has fallen into the error of ascribing Mr. Justice Story's views to the court of which he was a member.

Mr. Justice Story said: —

"It has, however, been supposed by the counsel of the claimants that a distinction exists between taking the protection of a neutral and of a belligerent convoy that in the former case all armament for resistance is unlawful, but in the latter case it is not only lawful, but in the highest degree commendable. That although an unlawful act, as resistance by a neutral convoy, may justly affect the whole associated ships, yet it is otherwise of a lawful act, as resistance of a belligerent ship; for no forfeiture can reasonably grow out of such an act, which is strictly justifiable.

"The fallacy of the argument consists in assuming the very ground in controversy and confounding things in their own nature entirely distinct. An act perfectly lawful in a belligerent may be flagrantly wrongful in a neutral. A belligerent may lawfully resist search; a

neutral is bound to submit to it. A belligerent may carry on his commerce by force; a neutral cannot. A belligerent may capture the property of his enemy on the ocean; a neutral has no authority whatever to make captures. The same act, therefore, that with reference to the acts and duties of the one may be tortious, may, with reference to the rights and duties of the other, be perfectly justifiable. The act, then, as to its character, is to be judged not merely by that of the parties through whose immediate instrumentality it is done, but also by the character of those who, having co-operated in, assented to, or sought protection from it, would yet withdraw themselves from the penalties of the act. It is analogous to the case at common law where an act, justifiable in one party, does not, from that fact alone, shelter his coadjutor. They must stand or fall upon their own merits. It would be strange indeed if, because a belligerent may kill his enemy, a neutral may aid in the act; or because a belligerent may resist search, a neutral may co-operate to make it effectual. It is therefore an assumption utterly inadmissible that a neutral can avail himself of the lawful act of an enemy to protect himself in an invasion of a clear belligerent right.

"And what reason can there be for the distinction contended for? Why is the resistance of the convoy deemed the resistance of the whole neutral associated ships, let them belong to whom they may? It is not that there is a direct and immediate co-operation in the resistance, because the case supposes the contrary. It is not that the resistance of the convoy of the sovereign is deemed an act to which all his own subjects consent, because the ships of foreign subjects would then be exempted. It is because there is a constructive resistance resulting in law from the common association and voluntary protection against search made under a full knowledge of the intentions of the convoy. Then the principle applies as well to a belligerent as to a neutral convoy; for it is manifest that the belligerent will at all events resist search; and it is quite as manifest that the neutral seeks belligerent protection with an intent to evade it. Is it that an evasion of search, by the employment, protection, or terror of force, is consistent with neutral duties? Then, *a fortiori*, the principle applies to a case of belligerent convoy, for the resistance must be presumed to be more obstinate and the search more perilous.

"There can be but little doubt that it is upon the latter principle that the penalty of confiscation is applied to neutrals. The law proceeds yet further, and deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and therefore attributes to such preliminary act the full effect of actual resistance. In this respect it

applies a rule analogous to that in the case of blockade, where the act of sailing with an intent to break a blockade is deemed a sufficient breach to authorize confiscation. And Sir William Scott manifestly recognizes the correctness of this doctrine in the *Maria*, although the circumstances of that case did not require its rigorous application.

"Indeed, in relation to a neutral convoy, the evidence of an intent to resist, as well as constructive resistance, is far more equivocal than in case of a belligerent convoy. In the latter case it is necessarily known to the convoyed ships that the belligerent is bound to resist and will resist until overcome by superior force. It is impossible, therefore, to join such convoy without an intention to receive the protection of belligerent force in such manner and under such circumstances as the belligerent may choose to apply it. It is an adoption of his acts and an assistance of his interests during the assumed voyage. To render the convoy an effectual protection it is necessary to interchange signals and instructions, to communicate information, and to watch the approach of every enemy. The neutral solicitously aids and co-operates in all these important transactions, and thus far manifestly sides with the belligerent and performs, as to him, a meritorious service, — a service as little reconcilable with neutral duties as the agency of a spy or the fraud of the bearer of hostile despatches. In respect to a neutral convoy, the inference of constructive co-operation and hostility is far less certain and direct. To condemn in such case is pushing the doctrine to a great extent, since it is acting upon the presumption, which is not permitted to be contradicted, that all the convoyed ships distinctly understood and adopted the objects of the convoy, and intimately blended their own interests with hostile resistance." Story, J., in *The Nereide*, 9 Cranch, 380.

When Mr. Justice Johnson delivered the later opinion of the court in the case of the *Atalanta*, he had undoubtedly in mind the dissenting opinion delivered three years before by his colleague ; his remarks as to convoy, therefore, were undoubtedly carefully weighed and considered, and should be given a force not usually accorded to illustrations or statements merely argumentative in judicial decision. We infer that had the question of the effect upon a neutral of voluntary submission to a belligerent convoy been before them for adjudication at that time, the Supreme Court would have followed the reasoning of Mr. Justice Story.

The discussions between the United States and Denmark early in this century are often alluded to in connection with questions similar to that presented in the case at bar, but it cannot be effectively cited as bearing in any important manner upon the single issue now presented.

The treaty of 1830 with Denmark provided for the payment of the claims, but it cannot be regarded as a precedent, for it contained a declaration that the convention, having no other object than to terminate all the claims, "can never hereafter be invoked by one party or the other as a precedent or rule for the future." Dana's Wheaton, Part LV. section 537.

Nor was the exact point we are now considering presented in the Danish case. The question there discussed is thus presented by Mr. Wheaton, who conducted the negotiations and signed the treaty:

"The principle laid down in the ordinance as interpreted by the Danish tribunals was that the fact of having navigated under enemies convoy is, *per se*, a justifiable cause, not of capture merely, but of condemnation, in the courts of the other belligerent; and *that*, without inquiring into the proofs of proprietary interest or the circumstances and motives under which the captured vessel had joined the convoy, or into the legality of the voyage, or the innocence of her conduct in other respects." Dana's Wheaton, Part LV. section 531.

In Denmark the vessels were condemned because at a previous time they had been under enemy convoy. When seized they were without convoy, whereas the *Nancy* was actually under convoy when seized.

If we omit consideration of points presented by a state of real or *quasi* armed neutrality, which do not affect our present purpose, we shall find in the history of the Department of State any other precedent than the Danish case to be invoked in aid of a solution of the problem now presented to us.

Assuming, therefore, that the Supreme Court has indicated through two learned justices that in their opinion voluntary submission by the neutral to the enemy convoy taints the vessel, we turn to the text-writers.

Mr. Wheaton gives but little aid, as his interesting discussion of the convoy relates to the Danish negotiations and to the position then taken by him, not as an unprejudiced text-writer, but as the diplomatic agent of the government, acting under instructions from his superior officers. His annotator, Mr. Dana, is, however, most explicit when he treats of the very question now before us.

Speaking of neutral under belligerent convoy, Mr. Dana says:

"It is not enough for the ostensible neutral to say, or even to prove, that he is not justly liable to capture, for the law of nations requires him to afford the belligerent a certain mode of satisfying himself on that point by visit and search; and if he refuses, resists, or fraudently evades the proper search, he is, for that cause, liable to capture. The only question ever raised has been, whether the act of being found under belligerent convoy affords a conclusive presumption of an

intent to deprive the other belligerent of the right of search or is only a fact, having its weight, but open to explanation." Dana's Wheaton, Part LV. ch. III. final foot-note.

Chancellor Kent is also direct in his statement:

"The very act of sailing under the protection of a belligerent or neutral convoy, for the purpose of resisting search, is a violation of neutrality." 1 Kent, p. 155.

The principle upon which the Danish case was decided

"Seems (according to Dr. Woolsey) to run between making use of the enemy's flag and putting one's goods on board an armed enemy's vessel. The former is done to enjoy certain privileges, offered by a party of war, which would not otherwise be secured. The latter may be done without complicity with the intentions or conduct of the captain of the armed ship, or may be done with the design of having two strings to one's bow; of availing one's self of force or not, as circumstances shall require. Upon the whole, the intention to screen the vessels behind the enemy's guns is so obvious, that the act must be pronounced to be a decided departure from the line of neutrality, and one which may justly entail confiscation on the offending party." Sec. 193.

Vattel (bk. III. ch. 7, sec. 114), says:

"Aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise."

Valin, commenting upon the French ordinance of 1681, which provides that every vessel shall be good prize in case of resistance and combat, states that resistance alone without combat justifies condemnation. Valin sur l'ordonnance de 1681, sec. 12, page 81.

In the *Maria*, Sir William Scott said:

"I stand with confidence upon all fair principles of reason — upon the distinct authority of Vattel — upon the institutes of other great maritime countries, as well as those of our own country — when I venture to lay it down that, by the law of nations as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel to a lawful cruiser, is followed by the legal consequence of confiscation." 1 C. Rob. p. 340.

In the case of *The Catharina Elizabeth*, 5 C. Rob. p. 232, the same eminent judge held that resistance by an enemy master will not affect his neutral cargo — a decision quite in harmony with that of the Supreme Court in the *Nereide* — and he observed:

"If a neutral master attempts a rescue, he violates a duty which is imposed upon him by the laws of nations, to submit to come in for inquiry as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequences will undoubtedly

reach the property of his owner; and it would, I think, extend to the confiscation of the whole cargo intrusted to his care and thus fraudulently attempted to be withdrawn from the rights of war. With an enemy master the case is very different." See also *The Dispatch*, 3 C. Rob. p. 278.

Dr. Phillimore, commenting upon Sir William Scott's opinion in the *Maria*, that "it is wild conceit that wherever force is used it may be lawfully resisted," concludes thus:

"It is upon these principles that international law universally, by its accredited voice, inflicts the penalty of confiscation upon the neutral merchantman or private vessel which resists the belligerent's right of search." Vol. III. CCCXXXVI.

Proceeding then to consider the case of a private vessel under convoy, he uses and apparently adopts the language of Sir William Scott in what the author describes as "one of his most careful and best reasoned judgments," that given in the case of the *Maria*, a vessel sailing under armed convoy for the purpose of resisting visitation and search.

In his treatise on international law Mr. Hall, citing Mr. Justice Story's opinion in the *Nereide*, concludes that "on this point, as usually, English and American writers and judges are fully in accord." Part IV. ch. X. p. 679.

Further (p. 275), he holds that, if the belligerent be within his rights when visiting, "the neutral master is guilty of an unprovoked aggression in using force to prevent the visit from being accomplished, and the belligerent may consequently treat him as an enemy and confiscate his ship."

In the unreported case of the *Sampson*, decided by the lords of appeal, alluded to in the *Maria* and the *Nereide* and cited by Mr. Dana, it was decided that the bare fact of being found under enemy convoy afforded a conclusive presumption of intent to deprive the other belligerent of the right of search.

In Manning's Commentaries on the Law of Nations (p. 369), we find his view thus stated:

"As a general principle I think that the sailing under the convoy of a belligerent must be regarded as a withdrawal from the search of the other belligerent, as a resistance to his rights, and as entailing confiscation as a consequence of such attempted evasion."

Ortolan, speaking of the Danish case, excuses the acts of the American ships upon the ground of an innocent ruse, excusable from the desire they had of escaping from the rigor of the French decrees, but he says that, apart from the special circumstances of this case —

"It cannot be said that the fact of a neutral vessel navigating under

the convoy of a belligerent is not an irregular and even illegal act. Such a convoy cannot, at all events, exempt from visit." Ortolan, Diplomatie de la Mer, tome II. p. 245.

Hautefeuille takes a different view, viz., that the neutral who places himself under belligerent convoy does not fail in his duty or violate his neutral character; he exposes himself to be taken with the belligerent convoy, but is not subject to confiscation; to go free it should be sufficient to establish his nationality and the innocence of his trade. Droits des nations neutres, tome III. pp. 162, 164. This author, however, treats the subject rather as a philosopher than as a jurist, and does not assume that the law as stated by him was the law actually in existence, but rather that which he thought should exist and be enforced.

The authorities agree that visit and search in time of war are belligerent rights of self-preservation to which the neutral must submit; that actual resistance by the neutral to the exercise of this right authorizes condemnation; that voluntary submission to belligerent convoy is constructive resistance which authorizes seizure. So far the authorities are united; but they are not agreed as to the result of this constructive resistance, whether it raises a conclusive presumption authorizing confiscation of the neutral or presents only a suspicious circumstance capable of explanation. The weight of authority, however, is adverse to this claimant, and we accordingly hold that, in the year 1798, a neutral vessel, if captured when actually under the protection of an enemy's vessel of war, is for that reason alone good prize.

It has been urged that a statute of the United States authorized resistance by our merchantmen to French visitation and search, to which there is the simple answer that no single state can change the law of nations by its municipal regulations.

We do not forget the great dangers incurred by neutrals during the wars of the last century, arising somewhat from the illegal acts of belligerent armed public vessels, but especially from privateers, and the inexcusable course of some of the prize tribunals. We have already commented upon this condition in former opinions, and we are agreed that acts of neutral vessels of commerce under the then existing dangers should be judged with leniency; but we find that under the law of nations, as declared and observed in 1798, the United States could not have prosecuted to a successful issue the case of the *Nancy* after it had been shown that, when taken, she was voluntarily under the protection of an English armed vessel.

The case will be reported to Congress with the conclusion of law that the claimant is not entitled to indemnity.

THE BRIG "SEA NYMPH."

UNITED STATES COURT OF CLAIMS, 1901.

(36 *Court of Claims*, 369.)

WELDON, J., delivered the opinion of the court:[1] —

The facts shows that the brig *Sea Nymph*, Hastie, master, sailed on or about the 17th of April, 1797, from the port of Jéremie, on a commercial voyage, bound for Cape Nicholas Môle, whence she sailed May 14, 1797, bound for Philadelphia, laden with a cargo of sugar and coffee. The *Sea Nymph* sailed from the Môle under a British ship as a convoy, and while pursuing her voyage was seized on the high seas on the next day, May 15, 1797, by the French privateer *Le General Toussaint*, and carried into the port of St. Iago de Cuba, and both vessel and cargo were condemned by the French prize court, sitting at Cape François.

The grounds of condemnation as set forth in the decree are as follows:

"Considering the papers above mentioned establish and prove that the said brig has been captured, loaded with produce taken on board at Jéremie; considering that Jéremie is one of the ports of the colony in rebellion against the laws of the Republic, under the protection of the British Government, and declared in a state of permanent siege by the decree of the commission of the 6th Nivose last."

Upon the foregoing the court decrees the condemnation of the vessel and cargo as good prize.

It is contended on the part of the defendants that the condemnation of said vessel by the French court was lawful and proper, notwithstanding that it is not alleged as a ground in the condemnation that the ship at the time of seizure was sailing under a belligerent vessel as a convoy.

It has been repeatedly held by this court that if from the evidence in the case a sufficient ground of condemnation appears, the fact that such ground is not mentioned in the decree of condemnation would not have prevented France, and will not now prevent the United States, from insisting that although the decree is deficient in the allegations of good grounds for condemnation, yet if the evidence shows other grounds upon which the condemnation might have been made, there was no liability against France, and hence there can be none against the United States.

[1] Statement of the original report is omitted. — ED.

In the case of the ship *Joanna*, Boggs, master (24 C. Cls. R. 198), it is said:

"Before considering this subject we may say that we are of the opinion that should a good reason for the condemnation of a vessel appear in the record before the prize court, although that reason may not have been explicitly and specificially alleged by that tribunal as the reason for the result reached by them, we shall still uphold the decision of the tribunal."

In the case of Stewart, administrator (schooner *Nancy*), against the United States (27 C. Cls. R. 99), the question of the legal effect of being under convoy at the time of seizure was considered and decided by this court. It is said in that case that "the substantial ground of condemnation is found in the fact that when the *Nancy* was captured she was actually under convoy. The nature or the nationality of the convoy is not shown, but the history of the time forces the presumption that it was an English armed vessel, either public or, what is more likely, private. Jéremie was in the possession of the English, and so was the Môle." It is not shown in this case as to the nationality or character of the convoy, but judging from the circumstance of the seizure and the analogy to the facts in the case of the *Nancy*, the presumption arises that the convoy was either an English armed vessel or an English privateer.

It is said in substance in that case that there is no judicial decision in the United States upon the question presented by the record, and that this court must now in the first instance, in the history of this litigation, consider and determine the legal effect of sailing under a convoy at the time of seizure. In the case of the *Nancy*, the case of the *Nereide* (9 Cranch, 389) is cited, and quotation is made from the opinion of Chief Justice Marshall, page 432, in which it is said, "The general rule and incontestable principle is that a neutral has a right to employ a belligerent carrier, who exposes himself to capture and detention but not to condemnation."

In the case of the *Atalanta* (3 Wheaton, p. 409), Mr. Justice Johnson, distinguishing between the case of neutral goods laden upon belligerent vessels and neutral vessels under convoy, said:

"A convoy is an association for a hostile object. In undertaking it, a nation spreads over the merchant vessel an immunity from search which belongs only to a national ship; and by joining a convoy every individual ship puts off her pacific character and undertakes for the discharge of duties which belong only to the military and marine and adds to the numerical if not the real strength of the convoy. If, then, the association be voluntary, the neutral, in suffering the fate of the whole, has only to regret his own folly in wedding his fortune to

theirs; or, if involved in the aggression or opposition of the convoying vessel, he shares the fate which the leader of his own choice either was or would have been made liable to in case of capture."

In the case of the *Four Sisters*, McLean, master, No. 186, this court decided, as a conclusion of law, that the seizure and condemnation was not illegal, and that the owners and insurers had no claim of indemnity, therefore, on the French Government prior to the ratification of the convention of the 30th of September, 1800; that the said claim was not relinquished to France by the government of the United States, and that the claimants are not entitled to recover from the United States, as the *Four Sisters* was well armed, and when taken was vigorously resisting search. No opinion was given in that case, but in the case of the *Nancy* it is said, in substance, that the authorities agree that visit and search in time of war are belligerent rights of self-preservation, to which the neutral must submit; and that actual resistance to the exercise of such right authorizes condemnation; that voluntary submission to a belligerent convoy is constructive resistance, which authorizes seizure; that up to that point authorities are united, but they are not agreed as to the result of constructive resistance — whether it raises the conclusive presumption or presents only suspicious circumstances capable of explanation. It is contended that circumstances might justify a neutral being in the company of a convoy, and, if satisfactory, might excuse such neutral from the consequences of condemnation. In this case there are no explanations or circumstances which tend in their legal effect to excuse or mitigate the results growing out of the constructive resistance.

The court held in the case of the *Nancy* that the weight of authority was against the claimant, and that if a neutral vessel is captured when under the protection of an enemy's vessel of war it is for that reason good and lawful prize.

In the case of the *Maria*, reported in 1 C. Rob. 340, it was held that a vessel sailing under convoy of an armed ship for the purpose of resisting visitation and search was subject to condemnation because of that fact. It is said in the opinion of the court, by Sir William Scott:

"How stands it by the general law? I do not say that cases may not occur in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission, but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages if this is done vexatiously and without just cause, a merchant vessel has not a right to say, for itself (and an armed vessel has no right to say for it),

'I will submit to no such inquiry, but I will take the law into my own hands by force.' What is to be the issue if each neutral vessel has a right to judge for itself in the first instance whether it is rightly detained and to act upon that judgment to the extent of using force? Surely nothing but battle and bloodshed, as often as there is anything like an equality of force or equality of spirit."

It is said by Sir Sherston Baker, in his work on international law, section 17, page 289, in substance, that the question whether neutral vessels under enemy's convoy are liable to capture and condemnation has been elaborately discussed, and that in the case of the *Sampson* the Court of Appeals, in England, decided that sailing under an enemy's convoy was a conclusive ground of condemnation. In that connection it is said in substance, by the same distinguished author, that the exercise of the right of search within its true limits implies the right of using lawful force if necessary in its execution, the same as in the execution of a civil process on land. This right on one side implies the corresponding obligation and duty on the other of submission; and as the belligerent may lawfully apply his force to the neutral property for the purpose of ascertaining its character and destination, it follows, as a logical effect and necessity, that the neutral may not lawfully resist the lawful exercise of the right of search. Sec. 11, p. 296.

It is insisted by counsel for the claimant that it is not shown that at the time of the capture the ship was under convoy. In reply to that it may be said that it is shown by the decree that on the 14th of May, 1797, the ship sailed under a British convoy, and that on the next day she was captured. It is a familiar principle of law that a condition once established is presumed to continue until it is shown that a change had taken place; and the burden of proof being on the claimant to show that a change had taken place at the time of capture, the presumption prevails with its legal effects against the claimant in the absence of such a showing.

For the reasons above stated the court decides, as a conclusion of law, that the seizure and condemnation were lawful, and that the owners and insurers had no valid claim for indemnity therefor upon the French Government prior to the ratification of the convention between the United States and the French Republic concluded on the 30th day of September, 1830, and that the claims were not relinquished to France by the government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States, and that the claimants are not entitled to recover from the United States.

The facts in detail, with a copy of this opinion, will be certified to Congress in accordance with the statute.

THE "MARIANNA FLORA."

SUPREME COURT OF THE UNITED STATES, 1826.

(11 *Wheaton*, 1.)

Mr. Justice STORY delivered the opinion of the court.[1]

In considering the circumstances, the court has no difficulty in deciding that this is not a case of a piratical aggression, in the sense of the act of Congress. The Portuguese ship, though armed, was so for a purely defensive mercantile purpose. She was bound homewards with a valuable cargo on board, and could have no motive to engage in any piratical act or enterprise. It is true, that she made a meditated, and, in a sense, a hostile attack, upon the *Alligator*, with the avowed intention of repelling her approach, or of crippling or destroying her. But, there is no reason to doubt, that this attack was not made with a piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property. It was done upon a mistake of the facts, under the notion of just self-defence, against what the master very imprudently deemed a piratical cruiser. The combat was, therefore, a combat on mutual misapprehension; and it ended without any of those calamitous consequences to life which might have brought very painful considerations before the court.

It has, indeed, been argued at the bar, that even if this attack had been a piratical aggression, it would not have justified the capture and sending in of the ship for adjudication, because foreign ships are not to be governed by our municipal regulations. But the act of Congress is decisive on this subject. It not only authorizes a capture, but a condemnation in our courts, for such aggressions; and whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt that courts of justice are bound to obey and administer them.

The other count, which seeks condemnation on the ground of an asserted hostile aggression, admits of a similar answer. It proceeds upon the principle, that, for gross violations of the law of nations on the high seas, the penalty of confiscation may be properly inflicted upon the offending property. Supposing the general rule to be so in ordinary cases of property taken *in delicto*, it is not, therefore, to be admitted, that every offence, however small, however done under a mistake of rights, or for purposes wholly defensive, is to be visited

[1] Facts of the case, the question of damages, and part of the opinion are omitted. — ED.

with such harsh punishments. Whatever may be the case, where a gross, fraudulent, and unprovoked attack is made by one vessel upon another upon the sea, which is attended with grievous loss or injury, such effects are not to be attributed to lighter faults, or common negligence. It may be just, in such cases, to award to the injured party full compensation for his actual loss and damage; but the infliction of any forfeiture beyond this does not seem to be pressed by any considerations derived from public law.

Pirates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation; for they are, in truth, the common enemies of all mankind, and, as such, are liable to the extreme rights of war. And a piratical aggression by an armed vessel sailing under the regular flag of any nation, may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations. But every hostile attack, in a time of peace, is not necessarily piratical. It may be by mistake, or in necessary self-defence, or to repel a supposed meditated attack by pirates. It may be justifiable, and then no blame attaches to the act; or, it may be without just excuse, and then it carries responsibility in damages. If it proceed farther, if it be an attack from revenge and malignity, from gross abuse of power, and a settled purpose of mischief, it then assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer.

These latter ingredients are entirely wanting in the case before us; and, therefore, if the question of forfeiture were now in judgment, we should have no doubt, either upon the act of Congress, or the general law, that it ought not to be enforced.

But, in the present posture of this cause, the libellants are no longer plaintiffs. The claimants interpose for damages in their turn, and have assumed the character of actors. They contend that they are entitled to damages, first, because the conduct of Lieutenant Stockton, in the approach and seizure of the *Marianna Flora*, was unjustifiable; and, secondly, because, at all events, the subsequent sending her in for adjudication was without any reasonable cause.

In considering these points, it is necessary to ascertain what are the rights and duties of armed and other ships, navigating the ocean in time of peace. It is admitted, that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. It is true, that it has been held in the courts of this country, that American ships, offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may, afterwards, be

pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but, whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, *sic utere tuo, ut non alienum lædas.*

It has been argued, that no ship has a right to approach another at sea; and that every ship has a right to draw round her a line of jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach.

This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations within cannon-shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent appropriation, and has never been successfully asserted beyond it. Every vessel undoubtedly has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognized, and we see no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and, hitherto, there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war sailing, as in the present case, under the authority of their government, to arrest pirates, and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it is as clear, that no ship is, under such circumstances, bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way, and to use all necessary precau-

tions to avoid any suspected sinister enterprise or hostile attack. She has a right to consult her own safety; but, at the same time, she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers; either as to delay, or the progress or course of her voyage; but she is not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers. These principles seem to us the natural result of the common duties and rights of nations navigating the ocean in time of peace. Such a state of things carries with it very different obligations and responsibilities from those which belong to public war, and is not to be confounded with it.

The first inquiry, then, is, whether the conduct of Lieutenant Stockton was, under all the circumstances preceding and attending the combat, justifiable. There is no pretence to say that he committed the first aggression. That, beyond all question, was on the part of the *Marianna Flora;* and her firing was persisted in after the *Alligator* had hoisted her national flag, and, of course, held out a signal of her real pacific character. What, then, is the excuse for this hostile attack? Was it occasioned by any default or misconduct on the part of the *Alligator?* It is said, that the *Alligator* had no right to approach the *Marianna Flora*, and that the mere fact of approach authorized the attack. This is what the court feels itself bound to deny. Lieutenant Stockton, with a view to the objects of his cruise, had just as unquestionable a right to use the ocean, as the Portuguese ship had; and his right of approach was just as perfect as her right of flight. But, in point of fact, Lieutenant Stockton's approach was not from mere motives of public service, but was occasioned by the acts of the *Marianna Flora*. He was steering on a course which must, in a short time, have carried him far away from her. She lay to, and showed a signal ordinarily indicative of distress. It was so understood, and, from motives of humanity, the course was changed, in order to afford the necessary relief. There is not a pretence in the whole evidence, that the lying to was not voluntary, and was not an invitation of some sort. The whole reasoning on the part of the claimants is, that it was for the purpose of meeting a supposed enemy by daylight, and, in this way, to avoid the difficulties of an engagement in the night. But how was this to be known on board of the *Alligator!* How was it to be known that she was a Portuguese ship, or that she took the *Alligator* for a pirate, or that her object in laying to was a defensive operation? When the vessels were within reach of each other, the first salutation from the ship was a shot fired ahead, and, at the same time, no national flag appeared at the mast-head. The ship was armed, appeared full of men, and, from her manœuvres, almost necessarily led to the supposi-

tion, that her previous conduct was a decoy, and that she was either a piratical vessel, or, at least, in possession of pirates. Under such circumstances, with hostilities already proclaimed, Lieutenant Stockton was certainly not bound to retreat; and, upon his advance, other guns, loaded with shot, were fired, for the express purpose of destruction. It was, then, a case of open, meditated hostility, and this, too, without any national flag displayed by the Portuguese ship, which might tend to correct the error, for she never hoisted her flag until the surrender. What, then, was Lieutenant Stockton's duty? In our view it was plain; it was to oppose force to force, to attack and to subdue the vessel thus prosecuting unauthorized warfare upon his schooner and crew. In taking, therefore, the readiest means to accomplish the object, he acted, in our opinion, with entire legal propriety. He was not bound to fly, or to wait until he was crippled. His was not a case of mere remote danger, but of imminent, pressing, and present danger. He had the flag of his country to maintain, and the rights of his cruiser to vindicate. To have hesitated in what his duty to his government called for on such an occasion would have been to betray (what no honorable officer could be supposed to indulge) an indifference to its dignity and sovereignty.

But, it is argued, that Lieutenant Stockton was bound to have affirmed his national flag by an appropriate gun; that this is a customary observance at sea, and is universally understood as indispensable to prevent mistakes and misadventures; and that the omission was such a default on his part, as places him *in delicto* as to all the subsequent transactions. This imputation certainly comes with no extraordinary grace from the party by whom it is now asserted. If such an observance be usual and necessary, why was it not complied with on the part of the *Marianna Flora?* Her commander asserts, that by the laws of his own country, as well as those of France and Spain, this is a known and positive obligation on all armed vessels, which they are not at liberty to disregard. Upon what ground, then, can he claim an exemption from performing it? Upon what ground can he set up as a default in another, that which he has wholly omitted to do on his own part? His own duty was clear, and pointed out; and yet he makes that a matter of complaint against the other side, which was confessedly a primary default in himself. He not only did not hoist or affirm his flag in the first instance, but repeatedly fired at his adversary with hostile intentions, without exhibiting his own national character at all. He left, therefore, according to his own view of the law, his own duty unperformed, and fortified, as against himself, the very inference, that his ship might properly be deemed, under such circumstances, a piratical cruiser.

But we are not disposed to admit that there exists any such universal rule or obligation of an affirming gun, as has been suggested at the bar. It may be the law of the maritime states of the European continent already alluded to, founded in their own usages or positive regulations. But, it does not hence follow, that it is binding upon all other nations. It was admitted, at the argument, that the English practice is otherwise; and, surely, as a maritime power, England deserves to be listened to with as much respect, on such a point, as any other nation. It was justly inferred, that the practice of America is conformable to that of England; and the absence of any counterproof on the record, is almost of itself decisive. Such, however, as the practice is, even among the continental nations of Europe, it is a practice adopted with reference to a state of war, rather than peace. It may be a useful precaution to prevent conflicts between neutrals, and allies, and belligerents, and even between armed ships of the same nation. But the very necessity of the precaution in time of war arises from circumstances which do not ordinarily occur in time of general peace. Assuming, therefore, that the ceremony might be salutary and proper in periods of war, and suitable to its exigencies, it by no means follows that it is justly to be insisted on at the peril of costs and damages in peace. In any view, therefore, we do not think this omission can avail the claimants.

Again, it is argued, that there is a general obligation upon armed ships, in exercising the right of visitation and search, to keep at a distance, out of cannon-shot, and to demean themselves in such a manner as not to endanger neutrals. And this objection, it is added, has been specially provided for, and enforced by the stipulations of many of our own treaties with foreign powers. It might be a decisive answer to this argument, that, here, no right of visitation and search was attempted to be exercised. Lieutenant Stockton did not claim to be a belligerent, entitled to search neutrals on the ocean. His commission was for other objects. He did not approach or subdue the *Marianna Flora*, in order to compel her to submit to his search, but with other motives. He took possession of her, not because she resisted the right of search, but because she attacked him in a hostile manner, without any reasonable cause or provocation.

Doubtless, the obligation of treaties is to be observed with entire good faith, and scrupulous care. But stipulations in treaties having sole reference to the exercise of the rights of belligerents in time of war cannot, upon any reasonable principles of construction, be applied to govern cases exclusively of another nature, and belonging to a state of peace. Another consideration, quite sufficient to establish that such stipulations cannot be applied in aid of the present case, is, that what-

ever may be our duties to other nations, we have no such treaty subsisting with Portugal. It will scarcely be pretended, that we are bound to Portugal by stipulations to which she is no party, and by which she incurs no correspondent obligation.

THE SHIP "ROSE" v. THE UNITED STATES.

United States Court of Claims, 1901.

(36 *Court of Claims*, 291.)

Weldon, J., delivered the opinion of the court:[1] —

The facts show that the ship *Rose*, William Chase, master, sailed on a commercial voyage from Newburyport, Mass., on the 20th of March, 1799, bound for Surinam, and thence sailed on the 23d of July, 1799, bound home to Newburyport.

While pursuing the last voyage she was captured on the high seas on the 31st of July, 1799, by the French cruiser *L'Egypt Conquise*, mounting 14 guns and 120 men; after an action of two and one-half hours, in which the master of the *Rose* lost 3 men killed and 14 wounded, and the French lost 25 killed and 21 wounded, the *Rose* was captured and taken into Guadeloupe, where, on the 6th day of August, 1799, the vessel and cargo were condemned by the tribunal of commerce, sitting at Basse Terre, Guadeloupe, under a decree in which it is alleged that "the captain of said ship was the bearer of a commission from the President of the United States which authorized him to capture French armed vessels and carry them into any port of the United States, and that the captain of the vessel resisted until he was subdued by force of arms. In view of these facts the court makes reference to articles in justification of said proceedings." The findings establish the fact that the American ship resisted most vigorously the attempted right of search upon the part of the French ship, and we are to determine from that condition as an incident of the seizure whether such seizure and condemnation were illegal.

The legal effect of resisting search on the part of the American ship, when it was sought to be exercised on the part of the French ship, has not been determined by any adjudication of this court in the various cases tried under the act of Congress, giving this court jurisdiction to determine the claims of American citizens for alleged spoliations committed by the French prior to the 1st day of July, 1801.

The nearest approach that the court has made to the subject of the

[1] The statement of the original report is omitted. — Ed.

right of search is in the case of the *Nancy* (27 C. Cls. R. p. 99). In that case the ship sailed from Baltimore in 1797; was captured by an English ship and sent to St. Nicholas Môle, and there the master was ordered not to depart without a convoy. She sailed under the escort of a privateer for Jéremie and returned to the Môle under escort. On the return voyage the *Nancy* was captured by a French privateer. It is said in that case that "the question whether a neutral vessel laden with neutral cargo is liable to condemnation if captured under enemy convoy has never been directly determined; but on a review of the cases and elementary writers it is now held that if captured when actually and voluntarily under the protection of an enemy she is liable." Sailing under the convoy of an enemy is the exercise of the same power which is brought into requisition on the part of a neutral vessel when it resists the right of search by actual force.

If sailing under a convoy of an enemy of the belligerent is a just ground for seizure and condemnation, it must follow that resisting the exercise of search, as it was in this case, involves as serious consequences to the neutral vessel as where the right was denied by the presence and use of a convoy.

It is not necessary to multiply authorities to establish the right of search. It is said by Chancellor Kent (1 Kent's Commentaries, p. 155) that "in order to enforce the rights of belligerent nations against the delinquencies of neutrals, and to ascertain the real as well as the assumed character of all vessels on the high seas, the law of nations arms them with the practical power of visitation and search. The duty of self-preservation gives to belligerent nations this right. It is founded upon necessity, and is strictly and exclusively a war right, and does not rightfully exist in time of peace, unless conceded by treaty. All writers upon the law of nations, and the highest authorities, acknowledge the right in time of war as resting on sound principles of public jurisprudence and upon the institutes and practice of all great maritime powers." It is said by the same authority, page 154: "The whole doctrine was ably discussed in the English High Court of Admiralty in the case of the *Maria*, and it was adjudged that the right was incontestable, and that a neutral sovereign could not, by the interposition of force, vary that right."

In that case it is said by Sir William Scott, in stating the principles of international law upon the subject of search and of the right of a belligerent to search neutral vessels engaged in commerce on the high seas, "that the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargo, whatever be the destination, is an incontestable right of lawfully commissioned cruisers of a belligerent nation. I say, be the ships,

the cargoes, and destinations what they may, because till they are visited and searched it does not appear what the ships, the cargo, or the destinations are, and it is for the purpose of ascertaining these points that the necessity of this right of search exists."

Chancellor Kent, page 155, in further elaboration of the doctrine of the right of search, states the circumstances which might constitute an exception to that general rule, which makes it the duty of the neutral to subject itself to the jurisdiction of the belligerent in the exercise of the right of search. He says: —

"There may be cases in which the master of a neutral ship may be authorized by the natural right of self-preservation to defend himself against extreme violence threatened by a cruiser grossly abusing his commission; but except in extreme cases a merchant vessel has no right to say for itself, and an armed vessel has no right to say for it, that it will not submit to visitation and search or be carried into an proximate port for judicial inquiry."

The circumstances of this capture do not indicate that the condition cited by Chancellor Kent (which may be regarded as an exception to the general rule) existed in this case. While there might have been in the minds of the crew of the neutral vessel grave apprehensions of ultimate condemnation, even with reference to the legitimate defences, that condition of apprehension upon the part of the resisting neutral did not justify him in denying the right of search to the belligerent. The circumstances of this case disclose a most vigorous assault and defence, there being twenty-four men killed and thirty-six wounded during the encounter between the respective vessels. This was actual resistance, and was only overcome by the most determined effort upon the part of the capturing vessel.

The right of search is so sacred in the view of international law that it is protected by enforcing the consequences of resistance where no actual resistance is made. As in the case of a convoy, it has been held by this court in the case of the *Nancy* (27 C. Cls. R. 99) that the presence of a convoy is constructive resistance and a denial of the right of search, which authorizes seizure and consequent condemnation.

It is most strenuously and ably argued by counsel that at the date of capture there was in existence the statute of June 25, 1798, entitled "An act to authorize the defence of merchant vessels of the United States against French depredations" (1 Stat. L. 572), and that by virtue of the provisions of that act the commander and crew of a vessel had a right to resist by all means in their power an attempt upon the part of a French commander and crew to search the American vessel. It is provided in that statute —

"That the commander and crew of any merchant vessel of the United States, owned wholly by a citizen or citizens thereof, may oppose and defend against any search, restraint, or seizure which shall be attempted upon such vessel or upon any other vessel owned, as aforesaid, by the commander or crew of any armed vessel sailing under French colors, or acting or pretending to act by or under the authority of the French Republic; and may repel by force any assault or hostility which shall be made or committed on the part of such French or pretended French vessel pursuing such attempt, and may subdue and capture the same, and may also retake any vessel owned as aforesaid which may have been captured by any vessel sailing under French colors, or acting or pretending to act by or under authority from the French Republic."

Whatever may be said as to the condition or status of the legal rights and obligations of the French and American Governments before the act July 9, 1798 (1 Stat. L. 578), it must be assumed that after that period the principles and rules of international law determined and controlled the parties with reference to their rights on the high seas.

It is said, in the case of the *Nancy* (*supra*), "It has been urged that the statute of the United States authorizes resistance by our merchantmen to French visitation and search, to which there is the simple answer that no single State can change the law of nations by its municipal regulations."

The contention of claimants' counsel with reference to the rights guaranteed to American merchantmen under and by virtue of the provisions of the act of 1798 is fully answered by the decision of this court in the above case. If, therefore, at the time of this seizure there was any conflict between the municipal law of the United States, as exemplified in the statute, and the well-recognized principles of international law, the latter must prevail in the determination of the rights of the parties.

By the provisions of the act giving this court jurisdiction to ascertain the claims of American citizens for spoliations committed by the French prior to the 31st of July, 1801, it is, in substance, provided that the validity of said claims shall be determined according to the rules of law, municipal and international, and the treaties of the United States applicable to the same. In order to perform the duties consistent with the requirements of the statute, the court must give each department of the law full recognition and force when properly applicable to the facts and circumstances of the controversy involved in the litigation.

The rights of the claimant are to be measured by the unlawful acts

of France, and unless a wrong exists under the rules of international law, no liability can attach to the United States; because, by the treaty of 1800, it was only the claims growing out of the wrongful act of France for which the United States had a diplomatic claim and which were assumed to be paid to the citizen whose individual right was violated in that wrong.

This court in making the investigation contemplated by the act of our jurisdiction is sitting in the character of an international tribunal, to determine the diplomatic rights of the United States as they existed against France prior to the ratification of the treaty of September 30, 1800.

The municipal law in the absence of a treaty must be subordinated to international law when they come in antagonism, as that is the law common to both parties.

Where the question is not exclusively within the domain of international law then the municipal law may be invoked to determine the proper solution of the question. The rules of property by which the citizen owned the subject-matter of the seizure and condemnation may be properly applied in ascertainment of his rights, and so may many questions of the law of evidence be decided in accordance with the municipal law of the party whose rights have been violated. Congress, in the enactment of the law of our jurisdiction, must be presumed as having recognized many of the principles of municipal law incident to our forms of judicial procedure and determination.

It has been argued that the belligerent, in making the attack on the vessel of the claimant, was not in the exercise of the legal right of search as incident to him as a belligerent, but that it was an assault, the object and purpose of which was the seizure and condemnation without reference to the fact, or condition of being a neutral vessel of the United States engaged in the peaceful and lawful commerce of the sea; that the condition existing between the two governments and peoples was such that all respect of neutral rights had ceased, and that force, fraud, and violence prevailed, and in that connection much is said as to the right of self-defence.

The claimants are treading on very dangerous ground when they urge the higher law of self-preservation. Self-defence is founded on the theory that it is the only remedy, and that, being the only remedy, it presupposes the absence of all law protecting the rights of him who asserts the prerogative of self-defence. If the right of self-defence prevailed to the extent of repelling force by force, and was incident to the crew of the ship captured, then all other law was silent and war prevailed, which condition would be most disastrous to the case of the claimants.

As we have quoted in another case, decided at the present term of court, from the opinion delivered by Sir William Scott in the case of the *Maria*, in 1 C. Rob. 340, so we quote upon the subject of the right of self-defence in this case:

"How stands it by the general law? I do not say that cases may not occur in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages, if this is done vexatiously and without just cause, a merchant vessel has not a right to say for itself (and an armed vessel has not a right to say for it), 'I will submit to no such inquiry, but I will take the law into my own hands by force.' What is to be the issue, if each neutral vessel has a right to judge for itself in the first instance whether it is rightly detained, and to act upon that judgment to the extent of using force? Surely nothing but battle and bloodshed, as often as there is anything like an equality of force or an equality of spirit."

For the reasons above stated, the court decides, as a conclusion of law, that the seizure and condemnation were lawful and that the owners and insurers had no valid claim of indemnity therefor upon the French Government prior to the ratification of the convention between the United States and the French Republic, concluded on the 30th day of September, 1800, and that the claims were not relinquished to France by the government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States, and that the claimants are not entitled to recover from the United States.

The facts in detail, with a copy of this opinion, will be certified to Congress in accordance with the statute.[1]

THE "NEREIDE."

SUPREME COURT OF THE UNITED STATES, 1815.

(9 *Cranch*, 388.)

MARSHALL, C. J., delivered the opinion of the court as follows:[2]

2. Does the treaty between Spain and the United States subject the goods of either party, being neutral, to condemnation as enemy prop-

[1] Accord *The Ship Amazon* v. *U. S.*, 1901, 36 Ct. Cl. 390. — ED.

[2] Statement of facts and discussion of evidence omitted. — ED.

erty, if found by the other in the vessel of an enemy? That treaty stipulates that neutral bottoms shall make neutral goods, but contains no stipulation that enemy bottoms shall communicate the hostile character to the cargo. It is contended by the captors that the two principles are so completely identified that the stipulation of the one necessarily includes the other.

Let this proposition be examined.

The rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly it has been fully and unequivocally recognized by the United States. This rule is founded on the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend. In the practical application of this principle, so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found.

Many nations have believed it to be their interest to vary this simple and natural principle of public law. They have changed it by convention between themselves as far as they have believed it to be for their advantage to change it. But unless there be something in the nature of the rule which renders its parts unsusceptible of division, nations must be capable of dividing it by express compact, and if they stipulate either that the neutral flag shall cover enemy goods, or that the enemy flag shall infect friendly goods, there would, in reason, seem to be no necessity for implying a distinct stipulation not expressed by the parties. Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion. Neither the one nor the other is to be ascribed to inattention. And if an omitted article be not necessarily implied in one which is inserted, the subject to which that article would apply remains under the ancient rule. That the stipulation of immunity to enemy goods in the bottoms of one of the parties being neutral does not imply a surrender of the goods of that party being neutral, if found in the vessel of an enemy, is the proposition of the counsel for the claimant, and he powerfully sustains that proposition by arguments arising from the nature of the two stipulations.

The agreement that neutral bottoms shall make neutral goods is, he very justly remarks, a concession made by the belligerent to the neutral. It enlarges the sphere of neutral commerce, and gives to the neutral flag a capacity not given to it by the law of nations.

The stipulation which subjects neutral property, found in the bottom of an enemy, to condemnation as prize of war, is a concession made by the neutral to the belligerent. It narrows the sphere of neutral commerce, and takes from the neutral a privilege he possessed under the law of nations. The one may be, and often is, exchanged for the other. But it may be the interest and the will of both parties to stipulate the one without the other; and if it be their interest, or their will, what shall prevent its accomplishment? A neutral may give some other compensation for the privilege of transporting enemy goods in safety, or both parties may find an interest in stipulating for this privilege, and neither may be disposed to make to, or require from, the other the surrender of any right as its consideration. What shall restrain independent nations from making such a compact? And how is their intention to be communicated to each other or to the world so properly as by the compact itself?

If reason can furnish no evidence of the indissolubility of the two maxims, the supporters of that proposition will certainly derive no aid from the history of their progress from the first attempts at their introduction to the present moment.

For a considerable length of time they were the companions of each other — not as one maxim consisting of a single indivisible principle, but as two stipulations, the one, in the view of the parties, forming a natural and obvious consideration for the other. The celebrated compact termed the armed neutrality attempted to effect by force a great revolution in the law of nations. The attempt failed, but it made a deep and lasting impression on public sentiment. The character of this effort has been accurately stated by the counsel for the claimants. Its object was to enlarge, and not in any thing to diminish the rights of neutrals. The great powers, parties to this agreement, contended for the principle, that free ships should make free goods; but not for the converse maxim; so far were they from supposing the one to follow as a corollary from the other, that the contrary opinion was openly and distinctly avowed. The King of Prussia declared his expectation that in future neutral bottoms would protect the goods of an enemy, and that neutral goods would be safe in an enemy bottom. There is no reason to believe that this opinion was not common to those powers who acceded to the principles of the armed neutrality.

From that epoch to the present, in the various treaties which have been formed, some contain no article on the subject and consequently

leave the ancient rule in full force. Some stipulate that the character of the cargo shall depend upon the flag, some that the neutral flag shall protect the goods of an enemy, some that the goods of a neutral in the vessel of a friend shall be prize of war, and some that the goods of an enemy in a neutral bottom shall be safe, and that friendly goods in the bottom of an enemy shall also be safe.

This review which was taken with minute accuracy at the bar, certainly demonstrates that in public opinion no two principles are more distinct and independent of each other than the two which have been contended to be inseparable.

Do the United States understand this subject differently from other nations? It is certainly not from our treaties that this opinion can be sustained. The United States have in some treaties stipulated for both principles, in some for one of them only, in some that neutral bottoms shall make neutral goods and that friendly goods shall be safe in the bottom of an enemy. It is therefore clearly understood in the United States, so far as an opinion can be formed on their treaties, that the one principle is totally independent of the other. They have stipulated expressly for their separation, and they have sometimes stipulated for the one without the other.

But in a correspondence between the Secretary of State of the United States and the Minister of the French Republic in 1793, Prussia is enumerated among those nations with whom the United States had made a treaty adopting the entire principle that the character of the cargo should be determined by the character of the flag.

Not being in possession of this correspondence the court is unable to examine the construction it has received. It has not deferred this opinion on that account, because the point in controversy at that time was the obligation imposed on the United States to protect belligerent property in their vessels, not the liability of their property to capture if found in the vessel of a belligerent. To this point the whole attention of the writer was directed, and it is not wonderful that in mentioning incidentally the treaty with Prussia which contains the principle that free bottoms make free goods, it should have escaped his recollection that it did not contain the converse of the maxim. On the talents and virtues which adorned the cabinet of that day, on the patient fortitude with which it resisted the intemperate violence with which it was assailed, on the firmness with which it maintained those principles which its sense of duty prescribed, on the wisdom of the rules it adopted, no panegyric has been pronounced at the bar in which the best judgment of this court does not concur. But this respectful deference may well comport with the opinion, that an argument incidentally brought forward by way of illustration, is not

such full authority as a decision directly on the point might have been.

3. The third point made by the captors is, that whatever construction might be put on our treaty with Spain, considered as an independent measure, the ordinances of that government would subject American property, under similar circumstances, to confiscation, and therefore the property, claimed by Spanish subjects in this case, ought to be condemned as prize of war.

The ordinances themselves have not been produced, nor has the court received such information respecting them as would enable it to decide certainly either on their permanent existence, or on their application to the United States. But be this as it may, the court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political not a legal measure. It is for the consideration of the government not of its courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics. Even in the case of salvage, a case peculiarly within the discretion of courts, because no fixed rule is prescribed by the law of nations, Congress has not left it to this department to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule. If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the court is bound by the law of nations which is a part of the law of the land.

Thus far the opinion of the court has been formed without much difficulty. Although the principles, asserted by the counsel, have been sustained on both sides with great strength of argument, they have been found on examination to be simple and clear in themselves. Stripped of the imposing garb in which they have been presented to the court, they have no intrinsic intricacy which should perplex the understanding.

The remaining point is of a different character. Belligerent rights and neutral privileges are set in array against each other. Their respective pretensions, if not actually intermixed, come into close contact, and the line of partition is not so distinctly marked as to be

clearly discernible. It is impossible to declare in favor of either, without hearing, from the other, objections which it is difficult to answer and arguments which it is not easy to refute. The court has given to this subject a patient investigation, and has endeavored to avail itself of all the aid which has been furnished by the bar. The result, if not completely satisfactory even to ourselves, is one from which it is believed we should not depart were further time allowed for deliberation.

4. Has the conduct of Manuel Pinto and of the *Nereide* been such as to impress the hostile character on that part of the cargo which was in fact neutral?

In considering this question the court has examined separately the parts which compose it.

The vessel was armed, was the property of an enemy, and made resistance. How do these facts affect the claim?

Had the vessel been armed by Pinto, that fact would certainly have constituted an important feature in the case. But the court can perceive no reason for believing she was armed by him. He chartered, it is true, the whole vessel, and that he might as rightfully do as contract for her partially; but there is no reason to believe that he was instrumental in arming her. The owner stipulates that the *Nereide* "well manned, victualled, equipped, provided, and furnished with all things needful for such a vessel," shall be ready to take on board a cargo to be provided for her. The *Nereide*, then, was to be put, by the owner, in the condition in which she was to sail. In equipping her, whether with or without arms, Mr. Pinto was not concerned. It appears to have been entirely and exclusively the act of the belligerent owner.

Whether the resistance, which was actually made, is in any degree imputable to Mr. Pinto, is a question of still more importance.

It has been argued that he had the whole ship, and that, therefore, the resistance was his resistance.

The whole evidence upon this point is to be found in the charter party, in the letter of instructions to the master, and in the answer of Pinto to one of the interrogatories *in preparatorio*.

The charter party evinces throughout that the ship remained under the entire direction of the owner, and that Pinto in no degree participated in the command of her. The owner appoints the master and stipulates for every act to be performed by the ship, from the date of the charter party to the termination of the voyage. In no one respect, except in lading the vessel, was Pinto to have any direction of her.

The letter of instructions to the master contains full directions for

the regulation of his conduct, without any other reference to Mr. Pinto than has been already stated. That reference shows a positive limitation of his power by the terms of the charter party. Consequently he had no share in the government of the ship.

But Pinto says in his answer to the 6th interrogatory that "he had control of the said ship and cargo."

Nothing can be more obvious than that Pinto could understand himself as saying no more than that he had the control of the ship and cargo so far as respected her lading. A part of the cargo did not belong to him, and was not consigned to him. His control over the ship began and ended with putting the cargo on board. He does not appear ever to have exercised any authority in the management of the ship. So far from exercising any during the battle, he went into the cabin, where he remained till the conflict was over. It is, then, most apparent that when Pinto said he had the control of the ship and cargo, he used those terms in a limited sense. He used them in reference to the power of lading her, given him by the charter party.

If, in this, the court be correct, this cause is to be governed by the principles which would apply to it had the *Nereide* been a general ship.

The next point to be considered is the right of a neutral to place his goods on board an armed belligerent merchantman.

That a neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean, is universally recognized as the original rule of the law of nations. It is, as has already been stated, founded on the plain and simple principle that the property of a friend remains his property wherever it may be found. "Since it is not," says Vattel, "the place where a thing is which determines the nature of that thing, but the character of the person to whom it belongs, things belonging to neutral persons which happen to be in an enemy's country, or on board an enemy's ships, are to be distinguished from those which belong to the enemy."

Bynkershoek lays down the same principles in terms equally explicit; and in terms entitled to the more consideration, because he enters into the inquiry whether a knowledge of the hostile character of the vessel can effect the owner of the goods.

The same principle is laid down by other writers on the same subject, and is believed to be contradicted by none. It is true there were some old ordinances of France declaring that a hostile vessel or cargo should expose both to condemnation. But these ordinances have never constituted a rule of public law.

It is deemed of much importance that the rule is universally laid down in terms which comprehend an armed as well as an unarmed

vessel; and that armed vessels have never been excepted from it. Bynkershoek, in discussing a question suggesting an exception, with his mind directed to hostilities, does not hint that this privilege is confined to unarmed merchantmen.

In point of fact, it is believed that a belligerent merchant vessel rarely sails unarmed, so that this exception from the rule would be greater than the rule itself. At all events, the number of those who are armed and who sail under convoy, is too great not to have attracted the attention of writers on public law; and this exception to their broad general rule, if it existed, would certainly be found in some of their works. It would be strange if a rule laid down, with a view to war, in such broad terms as to have universal application, should be so construed as to exclude from its operation almost every case for which it purports to provide, and yet that not a *dictum* should be found in the books pointing to such construction.

The antiquity of the rule is certainly not unworthy of consideration. It is to be traced back to the time when almost every merchantman was in a condition for self-defence, and the implements of war were so light and so cheap that scarcely any would sail without them.

A belligerent has a perfect right to arm in his own defence; and a neutral has a perfect right to transport his goods in a belligerent vessel. These rights do not interfere with each other. The neutral has no control over the belligerent right to arm — ought he to be accountable for the exercise of it?

By placing neutral property in a belligerent ship, that property, according to the positive rules of law, does not cease to be neutral. Why should it be changed by the exercise of a belligerent right, universally acknowledged and in common use when the rule was laid down, and over which the neutral had no control?

The belligerent answers, that by arming his rights are impaired. By placing his goods under the guns of an enemy, the neutral has taken part with the enemy and assumed the hostile character.

Previous to that examination which the court has been able to make of the reasoning by which this proposition is sustained, one remark will be made which applies to a great part of it. The argument which, taken in its fair sense, would prove that it is unlawful to deposit goods for transportation in the vessel of an enemy generally, however imposing its form, must be unsound, because it is in contradiction to acknowledged law.

It is said that by depositing goods on board an armed belligerent the right of search may be impaired, perhaps defeated.

What is this right of search? Is it a substantive and independent

right wantonly, and in the pride of power, to vex and harass neutral commerce, because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character.

Belligerents have a full and perfect right to capture enemy goods and articles going to their enemy which are contraband of war. To the exercise of that right the right of search is essential. It is a mean justified by the end. It has been truly denominated a right growing out of, and ancillary to the greater right of capture. Where this greater right may be legally exercised without search, the right of search can never arise or come into question.

But it is said that the exercise of this right may be prevented by the inability of the party claiming it to capture the belligerent carrier of neutral property.

And what injury results from this circumstance? If the property be neutral, what mischief is done by its escaping a search. In so doing there is no sin even as against the belligerent, if it can be effected by lawful means. The neutral cannot justify the use of force or fraud, but if by means, lawful in themselves, he can escape this vexatious procedure, he may certainly employ them.

To the argument that by placing his goods in the vessel of an armed enemy, he connects himself with that enemy and assumes the hostile character, it is answered that no such connection exists.

The object of the neutral is the transportation of his goods. His connection with the vessel which transports them is the same, whether that vessel be armed or unarmed. The act of arming is not his — it is the act of a party who has a right so to do. He meddles not with the armament nor with the war. Whether his goods were on board or not, the vessel would be armed and would sail. His goods do not contribute to the armament further than the freight he pays, and freight he would pay were the vessel unarmed.

It is difficult to perceive in this argument anything which does not also apply to an unarmed vessel. In both instances it is the right and the duty of the carrier to avoid capture and to prevent a search. There is no difference except in the degree of capacity to carry this duty into effect. The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel without imparting to his goods the belligerent character.

The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is

chargeable to the goods or their owner, where he has taken no part in it. They are incidents to the character of the vessel; and may always occur where the carrier is belligerent.

It is remarkable that no express authority on either side of this question can be found in the books. A few scanty materials, made up of inferences from cases depending on other principles, have been gleaned from the books and employed by both parties. They are certainly not decisive for or against either.

The celebrated case of the Swedish convoy has been pressed into the service. But that case decided no more than this, that a neutral may arm, but cannot by force resist a search. The reasoning of the judge on that occasion would seem to indicate that the resistance condemned the cargo, because it was unlawful. It has been inferred on the one side that the goods would be infected by the resistance of the ship, and on the other that a resistance which is lawful, and is not produced by the goods, will not change their character.

The case of the *Catharine Elizabeth* approaches more nearly to that of the *Nereide*, because in that case as in this there were neutral goods and a belligerent vessel. It was certainly a case, not of resistance, but of an attempt by a part of the crew to seize the capturing vessel. Between such an attempt and an attempt to take the same vessel previous to capture, there does not seem to be a total dissimilitude. But it is the reasoning of the judge and not his decision, of which the claimants would avail themselves. He distinguishes between the effect which the employment of force by a belligerent owner or by a neutral owner would have on neutral goods. The first is lawful, the last unlawful. The belligerent owner violates no duty. He is held by force and may escape if he can. From the marginal note it appears that the reporter understood this case to decide in principle that resistance by a belligerent vessel would not confiscate the cargo. It is only in a case without express authority that such materials can be relied on.

If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers forfeited by the same cause? The master and crew are prisoners of war, why are not those passengers who did not engage in the conflict also prisoners? That they are not would seem to the court to afford a strong argument in favor of the goods. The law would operate in the same manner on both.

It cannot escape observation that in argument the neutral freighter has been continually represented as arming the *Nereide* and impelling her to hostility. He is represented as drawing forth and guiding her warlike energies. The court does not so understand the case. The

Nereide was armed, governed, and conducted by belligerents. With her force, or her conduct, the neutral shippers had no concern. They deposited their goods on board the vessel, and stipulated for their direct transportation to Buenos Ayres. It is true that on her passage she had a right to defend herself, did defend herself, and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter party and of her duty.

With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials, of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench, to discover its only imperfection; its want of resemblance.

The *Nereide* has not that centaur-like appearance which has been ascribed to her. She does not rove over the ocean hurling the thunders of war while sheltered by the olive branch of peace. She is not composed in part of the neutral character of Mr. Pinto, and in part of the hostile character of her owner. She is an open and declared belligerent; claiming all the rights, and subject to all the dangers of the belligerent character. She conveys neutral property which does not engage in her warlike equipments, or in any employment she may make of them; which is put on board solely for the purpose of transportation, and which encounters the hazard incident to its situation; the hazard of being taken into port, and obliged to seek another conveyance should its carrier be captured.

In this it is the opinion of the majority of the court there is nothing unlawful. The characters of the vessel and cargo remain as distinct in this as in any other case. The sentence, therefore, of the Circuit Court must be reversed, and the property claimed by Manuel Pinto for himself and his partners, and for those other Spaniards for whom he has claimed, be restored, and the libel as to that property, be dismissed.[1]

[1] The concurring opinion of JOHNSON, J., and the dissenting opinion of STORY, J., omitted. See *The Fanny*, 1814, 1 Dod. 443, for a contemporaneous decision of an opposite character, and note Kent's comment on these two cases, in 1 Com. 132–133.

In the subsequent case of *The Atalanta*, 1818, 3 Wheat. 409, C. J. Marshall, in delivering the opinion of the court, said: "On the first question, the case does not essentially differ from that of the *Nereide*. It is unnecessary to repeat the reasoning on which that case was decided. The opinion then given by three judges is retained by them. The principle of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be, and probably will be changed, or so impaired as to leave no object to which it is applicable; but so long as the principle shall be acknow-

THE "ATLAS."

High Court of Admiralty, 1801.

(3 *C. Robinson*, 243.)

This was a case of an American ship and cargo of tobacco, claimed for merchants in America. The cargo had been sent originally from America to Vigo, or a market, consigned to the master for sale; at Vigo it was sold to the administration of the revenue of tobacco, under a contract of the master to deliver it at Seville, at his own risk, and there to receive payment. The ship was taken in the voyage from Vigo to Seville.

Court: — I do not see how this case can be distinguished from the case cited before the lords; I think I am bound to pronounce this cargo liable to condemnation, on the ground, that it is taken whilst going to an enemy's port, to be delivered there to an enemy, and to be paid for by him, having actually become his property, under an engagement to that effect, entered into by the person who is the appointed agent for the management of the cargo. It came from America as American property, but it was sold at Vigo to the Spanish Government, and went from thence to Seville as Spanish property; the contract under which it went was absolute and indefeasible: The goods can be considered in no other light than as the property of an enemy.

Cargo condemned. Ship restored. Freight refused as on a voyage in the coasting trade of the enemy.[1]

ledged, this court must reject constructions which render it totally inoperative." p. 415. For the reason of the thing, see the instructive and argumentative concurring opinion of Mr. Justice Johnson, pp. 410-433. — Ed.

[1] To the same effect the *Sally*, 1795, in note to the *Atlas*, *ut sup.*

Where enemy's property is fraudulently blended in the same claim with the neutral property the latter is liable to share the fate of the former. *The St. Nicholas*, 1816, 1 Wheat. 417.

See also *The Eenrom*, 1799, 2 C. Rob. 1; *The Calypso*, 1799, 2 C. Rob. 154; *The Susa*, 1799, 2 C. Rob. 251; *The Graaf Bernstorf*, 1800, 3 C. Rob. 109; *The Betsy*, 1815, 2 Gall. 377; *The Dos Hermanos*, 1817, 2 Wheat. 76; *The Fortuna*, 1818, 3 Wheat. 236. — Ed.

DARBY *et al.* v. THE BRIG "ERSTERN."

FEDERAL COURT OF APPEALS, 1782.

(2 *Dallas*, 34.)

This was an appeal from the Admiralty of the State of Massachusetts Bay, where the brig and her cargo had been acquitted. The case was argued on the 28th, 29th and 30th of January; and, on the 5th Feb., 1782, the definitive sentence of the court was pronounced by Paca and Griffin, the presiding commissioners, in the following terms:

By the Court: — Upon the evidence in this case, we are of opinion, that the brig, at the time of her capture, was the property of imperial subjects at Ostend, and that the cargo was British property, unprotected by the capitulation of Dominica.

It is objected, "The brig is not prize, because neutral property."

Neutral property cannot be captured: For, while the character of neutrality is preserved, such property is the property of a friend, on which the rights of war cannot attach; but the owners of a ship may violate their neutrality, by taking a decided part with the enemy: In what light is such a ship then to be considered, and what is to be done with her? The law of nations says, that a ship under those circumstances, is in the predicament of enemy's property, and subject to seizure and confiscation.

But it is said, "the ordinance of Congress ascertains in what cases the rights of neutrality are forfeited; that the present case is not comprehended; and therefore, if not protected by the law of nations, yet it is protected by the ordinance of Congress."

We are of opinion, that Congress did not mean, by their ordinance, to ascertain in what cases the rights of neutrality should be forfeited, in exclusion of all other cases; for, the instances not mentioned are as flagrant as the cases particularized. The ordinance does not specify the case of a neutral vessel employed in carrying provision to a place which is besieged, and in want of bread: for, although one of the articles says, "You shall permit all neutral vessels freely to navigate on the high seas, or the coasts of America, except such as are employed in carrying contraband goods, or soldiers, to the enemy;" yet another article says, that the term contraband shall be confined to the articles there enumerated, and provision is omitted. Were Congress asked, whether they meant to protect from capture

a neutral ship loaded with provision, and destined for York and Gloucester, when besieged by the armies of the United States and France, no one could possibly doubt what their answer would be. The plain and obvious construction of the ordinance is, that while neutral vessels observe the rights of neutrality, they shall not be interrupted by American captures: Congress meant to pay a regard to the rights, and not to the violations of neutrality.

But, it is objected, "that in this case, if the brig has violated the rights of neutrality, it is because she intended a violation of the capitulation of Dominica; that the capitulation of Dominica can only be considered as a local law, of which there can be no breach, until the offending ship comes within the civil jurisdiction of the island; that the brig was captured before the arrival within the jurisdiction of Dominica; and that therefore she was captured before there was any violation of the rights of neutrality."

If nothing could be objected against the brig, but an intentional violation of the capitulation, abstractedly from the consequences, with regard to the war between Great Britain, France, and the United States, possibly such reasoning might be conclusive: but we are of opinion, that the brig has done more than a mere intentional offence, with regard to the capitulation.

The subjects of a neutral nation cannot, consistently with neutrality, combine with British subjects to wrest out of the hands of the United States and of France the advantages they have acquired over Great Britain by the rights of war; for this would be taking a decided part with the enemy.

On the conquest of Dominica a capitulation took place, and by that capitulation, a commercial intercourse between Great Britain and that island was prohibited: the object was to weaken the power of Great Britain, by lessening her naval and commercial resources. But what has been the conduct of the brig and the imperial subjects her owners? Kender Mason, a British subject, establishes a plan at Ostend, by which the commerce of Great Britain with Dominica is to be kept up and preserved, through the intervention of that port. On this plan Liebert, Beas, Dardine, & Co., imperial subjects, purchase at London the brig *Erstern:* Kender Mason puts on board a cargo of British merchandise, the property of British subjects: the brig clears out from London, ostensibly for Ostend, and there arrives: Liebert, Beas, Dardine, & Co. supply her with false and colorable papers, assume upon themselves the ownership of the cargo, and dress it up in the garb of neutrality, to screen it from detention and capture: the brig then clears out for Dominica, and sails for that island with the cargo she took on board at London.

Can such conduct consist with neutrality? Can there be a more flagrant violation of it? Does it not aim to wrest, from France and the United States, the advantages they acquired by the conquest of Dominica: and does it not evince a fraudulent combination with British subjects, and a palpable partiality?

But, "Why shall the rights of neutrality be broke by works of supererogation? If the cargo was British property, unprotected by the capitulation, it was then the property of enemies, and as it did not consist of contraband articles, it was protected from capture by the ordinance of Congress: the brig, therefore, needed not to employ fraud and stratagem to give it the garb of neutrality, in order to screen it from capture."

If the offence, which the brig has committed, consisted in employing fraud and stratagem, merely to protect property which belonged to an enemy, the objection might, in consequence of the ordinance of Congress, be of some force. But the offence is not of so limited a nature; it is far more extensive, and comprehends a flagrant violation of the rights of neutrality: it results from a fraudulent combination with British subjects, to give weight and energy to the arms of Great Britain, by the re-establishment of a commerce, and its emoluments, which she had lost by the conquest of Dominica.

But, it is objected, "The cargo is not prize, because it is not contraband, and all the other effects and goods, though the property of an enemy, are exempted from capture by the ordinance of Congress."

If the *Erstern* had been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be prize; because Congress have said, by their ordinance, that the rights of neutrality shall extend protection to such effects and goods of an enemy. But, if the rights of neutrality are violated, Congress have not said, that such a violated neutrality shall give such protection: nor could they have said so, without confounding all the distinctions between right and wrong.

Upon the whole, we are of opinion, that the decree below be reversed, and that the said brig and cargo be condemned, as prize, for the use of the captors, without costs.[1]

[1] The Declaration of Paris, 1856. — Declaration respecting maritime law, signed by the plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, assembled in Congress at Paris, April 16, 1856.

The plenipotentiaries who signed the Treaty of Paris of the 30th of March, 1856, assembled in conference, — Considering:

That Maritime Law, in time of war, has long been the subject of deplorable disputes;

That the uncertainty of the law, and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

Section 48. — Prize Courts.[1]

MILLER v. THE "RESOLUTION" (1).

Federal Court of Appeals, 1781.

(2 *Dallas*, 1.)

These were appeals from the Admiralty Court of Pennsylvania, where the ship had been acquitted and the cargo condemned.

By the Court [Cyrus Griffin]:[2] — We have considered these appeals, and are now ready to give our judgment.

That it is consequently advantageous to establish a uniform doctrine on so important a point;

That the plenipotentiaries assembled in Congress at Paris cannot better respond to

[1] "In war the capture of property in the hands of the enemy, used or intended to be used for hostile purposes, is allowed by all civilized nations, and this whether the ownership be public or private. The title to movable property in hostile use, captured on land, passes to the captor as soon as the capture is complete; that is to say, as soon as the property is reduced to possession. The absolute title to immovable public property owned by the enemy does not pass until the war is ended and peace restored. Then, unless provision is made to the contrary by the treaty of peace or otherwise, the ownership is changed if the conquest is complete." *Kirk* v. *Lynd*, 1882, 106 U. S. 315, 317, per Waite, C. J.

"Treating the proceedings in the District Court as in admiralty, they are without validity. The admiralty jurisdiction of the District Court extends only to seizures on navigable waters, not to seizures on land. The difference is important, as cases in admiralty are tried without a jury, whilst in cases at law the parties are entitled to a jury, unless one is waived. *United States* v. *Betsey*, 4 Cranch, 443; *The Sarah*, 8 Wheat. 391." *U. S.* v. *Winchester*, 1878, 99 U. S. 372, 374, per Field, J.

"By the law of nations, as recognized and administered in this country, when movable property in the hands of the enemy, used, or intended to be used, for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, a judicial decree of condemnation is usually necessary to complete the title of captors. 1 Kent, Com. 102, 110; Halleck's International Law, c. 19, § 7; c. 30, § 4; *Kirk* v. *Lynd*, 106 U. S. 315, 317." *Oakes* v. *U. S.*, 1898, 174 U. S. 778, 786, per Gray, J. See *Commodore Stewart's Case*, *infra*.

In the case of *The Betsey*, 1901, 36 Ct. Cl. 256, a case arising out of the French Spoliation claims, the Court held, per Nott, C. J., that the prize courts of a belligerent nation in 1800 were not bound to take notice of a local custom at variance with the requirements of international law, or to infer, in the absence of an invoice, that the cargo belonged to the owners of the vessel.

For cases involving the distribution of prize money, see *Swan* v. *U. S.*, 1884, 19 Ct. Cl. 51 (dealing with Cushing's destruction of *The Albemarle*, 1864); *Dewey* v. *U. S.*, 1899, 178 U. S. 510. — Ed.

[2] Part of the judgment is omitted. — Ed.

It has been very truly observed, that this appeal is a case of importance, not only with regard to the subject in contest, but also

the intentions by which their governments are animated than by seeking to introduce into international relations fixed principles in this respect:

The above-mentioned plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn declaration:

1. Privateering is, and remains, abolished.

2. The neutral flag covers enemy's goods, with the exception of contraband of war.

3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The governments of the undersigned plenipotentiaries engage to bring the present Declaration to the knowledge of the states which have not taken part in the Congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned plenipotentiaries doubt not that the efforts of their governments to obtain the general adoption thereof will be crowned with full success. The present declaration shall not be binding, except between those Powers who have acceded, or shall accede to it. Done at Paris, April 16, 1856.

"But the terms of the declaration," says Mr. Hall, Int. Law, 709–710, "are not strictly authoritative law, and it is therefore not yet superfluous to sketch, though more lightly than was formerly necessary, the history and ground of the rival doctrines which have been held upon the two subjects. * * *

"Usually these subjects have been treated together, and the verbal jingle, 'Free ships, free goods; enemy ships, enemy goods,' has been thought to express a necessary correlation, which has been equally supposed to exist between the contrary doctrines. The Declaration of Paris, in choosing from each system the part most favorable to neutrals, has at least restored their natural independence, to two essentially distinct questions of law."

The United States, as is well known, refused to sign the declaration because private property was not freed from capture at sea, holding that privateers either were or might be necessary to protect or destroy such commerce in the absence of a powerful navy. Mexico, Spain, the United States, and Venezuela refused to join in the declaration, but it is likewise common knowledge that Spain and the United States adhered to it by express proclamation in their recent war. Mr. Hall is therefore justified in remarking that although "the freedom of enemy's goods in neutral vessels is not yet secured by a unanimous act, or by a usage which is in strictness binding on all nations, there is little probability of reversion to the custom which was at one time universal, and which till lately enjoyed a superior authority." Int. Law, p. 717.

In his note to the principal case, Mr. Pitt Cobbett says (in his Leading Cases on International Law, 2d. ed., at p. 299): "This case is cited as illustrating the principle that even when, by treaty, the neutral flag covers the goods, yet it must not be made the medium of an illicit trade. This limitation is equally applicable under the rules now established by the Declaration of Paris. Although the neutral flag may cover hostile goods, this will not warrant its being used for the purpose of carrying on illicit traffic."

Since the formal abolishing of privateering, by the Declaration of Paris, *supra*, the subject has merely an historical interest. A few notes and references are added. In *Hooper, Adm'r, v. U. S.*, 1887, 22 Ct. Cl. 408, 429, the following definition is given:

"A privateer is an armed vessel belonging to one or more private individuals,

with regard to the great questions of law, which the investigation and discussion of the merits necessarily introduced; and being before this court for their determination, the judgment and decree of this court must be directed by the resolves and ordinances of Congress, and, where they are silent, by the laws, usage, and practice of nations.

Upon these grounds, the case has been considered and argued by the counsel on both sides; and considered so thoroughly and argued so copiously, fully, and ably, that we have now every possible light of which the subject admits.

The general question is, "Whether on all the circumstances of this case, the ship or cargo, or both, or any part of the cargo, be a prize; and as such ought to be condemned and confiscated?" — the libellants contend that both ship and cargo are prize — if not the ship, yet the cargo is prize; if not the whole of the cargo, yet the principal part of it must be condemned.

Different grounds have been taken to support these several positions — one ground is taken to affect both ship and cargo; other and different grounds to affect the cargo; other and different grounds to affect the principal part of it.

The argument directed against both ship and cargo is this: By the law of nations, after a capture and occupation for twenty-four hours, the property captured is transferred to the captors but the ship and cargo in question were captured and occupied twenty-four hours — therefore the property was transferred to the captors — and as the captors were

licensed by government to take prizes from an enemy; its authority in this regard must depend altogether upon the extent of the commission issued to it, and is qualified and limited by the laws under which the commission is issued." *The Thomas Gibbons*, 8 Cranch, 421.

In *The Curlew*, 1812, Stew. Adm. 312, 326, Dr. Croke said: "By the law of nations, as well as the municipal law of this country, no private vessel can cruise against the enemy, but under a lawful commission. The power of granting such commission is the right only of the sovereign, or of those to whom he has deputed it. The Lord High Admiral, when there is one, and the Lords Commissioners of the Admiralty, who, when there is no Lord Admiral, is invested with his general rights, are the only persons to whom it is usual for the King to give authority to grant such commissions, by themselves or by such persons as they shall appoint. * * * By the law of nations: If any private subjects cruise against the enemy without such commission, they are liable to be treated as pirates." The American constitutional provision has been quoted, § 1, *ante*. Sailing and taking prize without letter of marque vests prize not in individual captor but in the King as *droit* of Admiralty, *Nichol* v. *Goodall*, 1804, 10 Ves. Jr. 155 (per Lord Eldon); master must be on board when capture made, though lieutenant's presence was sufficient if captain were dead, *The Charlotte*, 1804, 5 C. Rob. 280, Commissions must likewise be on board although loss later does not matter; *The Estrella*, 1819, 4 Wheat. 304. See generally, Taylor, Int. Law, 440, notes 37, 38, 39. — Ed.

British subjects, the property was British property, and therefore legally attacked and captured by the American privateer *Ariel*.

There is no doubt, but that a capture authorized by the rights of war transfers the property to the captor; but the question is whether a capture not authorized by the rights of war can have that legal operation: for, the claimant says, "that the ship was not originally British but Dutch and neutral property, and that the cargo also was not originally British but neutral property, in consequence of articles of capitulation, stipulated on the conquest of Dominica, by the arms of his most Christian Majesty."

All the authorities cited on cases of capture authorized by the rights of war, are where the property captured was the property of an enemy: not an instance has been produced where a capture, not authorized by the rights of war, has been held to change the property; but many authorities have been brought to show, that no change is effected by such capture. To say that a capture which is out of the sanction and protection of the rights of war, can nevertheless derive a validity from the rights of war, is surely a contradiction in terms. The rights of war can only take place among enemies, and therefore a capture can give no right, unless the property captured be the property of an enemy. But it is stated, that both ship and cargo, in the present case, were originally (that is antecedently to the British capture) in the predicament of neutral property: no property then was transferred by the capture, and of consequence the property in question was not upon the ground it has been considered — British property. "But, it is said, the fact cannot be ascertained, that the capture in this case was not authorized by the rights of war — for it depends upon the will of the sovereign, whether an outrage and capture, *supra altum mare*, by his subjects of the property of subjects of another nation, shall be an illegal and piratical act, or an act of hostility: that the sovereign is not obliged to promulge his will on the moment he makes war, and that as the human will has no physical existence, it cannot be ascertained but by a declaration of it by the sovereign himself, and therefore *non constat*, but that the capture in the present case was authorized by the British Crown, and so a fair act of hostility, authorized by the rights of war."

This argument is ingenious and plausible, but not solid. As the state of nature was a state of peace, and not a state of war, the natural state of nations is a state of peace and society, and hence it is a maxim of the law of nations, founded on every principle of reason, justice, and morality, that one nation ought not to do an injury to another. As the natural state (that of nations) is a state of peace and benevolence, nations are morally bound to preserve it. Peace and

friendship must always be presumed to subsist among nations; and therefore he who founds a claim upon the rights of war, must prove that the peace was broken by some national hostility, and war commenced: but mere conjecture, supposition, and possibility can render no competent evidence of the fact. But it is said "here was a national hostility — viz. The capture by the British privateer; and the act of the subject is the act of the sovereign."

The act of the subject can never be the act of the sovereign; unless the subject has been commissioned by the sovereign to do it: but, in this case, there is no evidence that the commission of the British privateer extended to property, under the circumstances of the property captured.

But it is asked "what private or public mischief can be apprehended from considering property under the circumstances of this case as prize: for the wrong was committed by the British privateer, and therefore the British nation is chargeable with it, and bound to make compensation."

We are inclined to think, that were the claimants to apply to the British Crown for compensation, they would be told "that although satisfaction were done, yet it would be in proportion only to the wrong done by the British privateer, which consisted only in the seizure and detention. But if compensation was expected for ship and cargo, they must look to that nation for it, whose courts declared a condemnation, and whose subjects reaped the fruits of it."

But, it is alleged, that "the late ordinance of Congress is express and decided, that after a capture and occupation for twenty-four hours the property captured shall be prize."

The ordinance of Congress certainly speaks of a legal capture; to admit a different construction would be a violence both to the terms and spirit, or intention, of it. Prize is generally used as a technical term to express a legal capture; and Congress having adopted it in framing of the ordinance, the general sense or acceptation of it must determine its import and signification. But suppose the term prize merely imported a capture, without any reference to its legality, and that it was the spirit and intention of the ordinance to subject to prize all captures, both legal and illegal, after twenty-four hours; it does not follow that it would affect the present case. The municipal laws of a country cannot change the law of nations, so as to bind the subjects of another nation; and by the law of nations a neutral subject, whose property has been illegally captured, may pursue and recover that property in whatever country it is found, unless a competent jurisdiction has adjudged it prize. The municipal laws of a country can only bind its own subjects.

The ordinance of Congress is in truth a new regulation of the *jus post liminii*, and limits it to a recapture within twenty-four hours, and therefore can only relate to the subjects of the United States: it adopts the ordinance of France, and that ordinance relates only to the subjects of France. In both cases, with regard to the owner, a subject, the property captured is not passed away before the expiration of twenty-four hours. But put the case of a capture and the sale of it before twenty-four hours to a neutral subject; the sale is certainly good and conclusive upon the owner; for the question must be decided by the law of nations, and by the law of nations, the property captured is transferred to the captor as soon as it is taken.

Both the ordinances therefore of Congress and of France, in our opinion, relate only to property captured from a subject and recaptured; and not to property captured from a neutral and recaptured. It is said, "that arguments drawn from the law of nations with regard to pirates, do not apply to the present case, because pirates have not the rights of war."

If the principal fact was properly attended to, the present case could not be questioned. Whence is it that pirates have not the rights of war? Is it not because they act without authority and commission from their sovereign? And is it not objected and proved, that the British privateer, with regard to the property captured, acted without commission and authority from the British Crown? So far from there being any dissimilarity in the cases, it is in fact the very case in judgment, considering it on the first ground of argument.

But, it is alleged, "that the capture by the British privateer must be considered as legal: for, after a capture and occupation for twenty-four hours, the legality of the capture is not open for question and examination."

This doctrine must never be suffered; there is no example or precedent for it to be found in any of our books; it breaks down and destroys the distinction between right and wrong; it gives a sanction to injustice, robbery, and piracy, and it is reprobated by the laws, usage, and practice of nations. Lord Mansfield, in the case so often quoted, 2 Burr. 693, says, "The question, whether the property is transferred by the capture, can only happen between the owner and vendee, and between the owner and the recaptor." But the question could never happen between the owner and the recaptor, if the legality of the capture was not examinable on every libel for condemnation as prize. The question is — prize or no prize? That is whether the capture be legal or not.

The legality of a capture is open for question and examination, till a competent jurisdiction has decided the question, and a decree passes

for condemnation as prize; then, and not before, all further questions and examinations are precluded; then, all parties, and all foreign courts, are estopped to say, "the capture is not legal;" and if the decree be erroneous or iniquitous, the party injured must apply for redress to that nation whose courts have committed the error or iniquity.

"Great difficulties, it is said, will arise, if capture and occupation for twenty-four hours should not be considered as conclusive evidence of property in the captor, and that the capture was legal." And it is asked "must a regular title be deduced from the first proprietor to the captor, as in case of an ejectment at the common law?" And "must common law strictness, in making out titles, be adopted in Admiralty Courts?"

Every libel states a title to the thing captured; the title must not only be stated, but it must also be proved. It is stated in the libel in this case, that the property captured was British property, and the evidence to prove it is, "possession and occupation of it by the British privateer."

A title thus traced is a good one, in a court of common law, except in a single case: it is a good title against all the world except the right owner. This exception is founded on every principle of reason and justice; it ought not only to be adopted in courts of common law, but in every court, where the distinction between right and wrong is preserved, and justice regarded. Possession and occupation ought, upon a question of property, to have the same influence in courts of admiralty, as in courts of common law: it ought to be considered as a good title, and conclusive upon all mankind except the right owner. Such a title is clear of all difficulties in the proof of it; it excludes the necessity of a regular deduction of title from the first proprietor down to the captor; it is disengaged from those entanglements, which result from a variety of possible changes and mutations of the property; and it cannot be shook, but when every honest man will say it ought to be shook, — when the right owner appears and proves his property. We have now done with the observations and reasoning, that relate to the first ground of argument: and are of opinion, that if the ship and cargo were originally neutral property, the capture and occupation for twenty-four hours did not change it into British property and make it prize.[1]

[1] Twenty-four hours' quiet possession by the enemy was test of capture by Act of Congress, March 27, 1781. Journals of Confederation Congress, VII. 59.

It was held, pp. 15 to 18, and for this purpose the case is cited by Kent, 1 Com. 104, that compacts with common enemy bind allies. — Ed.

MILLER v. THE "RESOLUTION" (2).

Federal Court of Appeals, 1781.

(2 *Dallas*, 19.)

By the Court: — As the original decree has not been carried into execution, we think it proper, under the peculiar circumstances of the present case, to allow a rehearing. But this is not to be drawn into precedent; nor is any point previously determined, to be brought again into litigation, unless the state of the facts respecting it shall be altered by the new evidence.

The causes were, accordingly, argued for several successive days; and on the 24th of Jan., 1782, the following revisionary decree (altering the suspended decree only as to a part of the cargo) was delivered by William Paca and Cyrus Griffin, the presiding commissioners.

By the Court: — We have considered the new evidence which has been laid before us, and we have also considered the observations and arguments, which the counsel upon both sides have made upon it.

On the first argument we were of opinion, that the ship ought to be considered in the predicament of neutral property, and entitled to all the rights and privileges of neutrality, which the ordinance of Congress ascertained and conferred; we took up this idea from a construction of the articles of capitulation and the British proclamation, which issued immediately on the rupture between Great Britain and the States General, and which protected the ship *Resolution* for a limited time from British capture on her passage from Dominica to Amsterdam: we conceived, that the neutrality of the States General, with regard to the ship, abstractly considered, was not broken by the rupture; the proclamation having controlled the extent of the war, by its exemption of the ship from being a subject of hostility and capture.

Such was our opinion on the first argument: but on consideration of the last argument, we are of a different opinion.

The writers upon the law of nations, speaking of the different kinds of war, distinguish them into perfect and imperfect: a perfect war is that which destroys the national peace and tranquillity, and lays the foundation of every possible act of hostility: the imperfect war is that which does not entirely destroy the public tranquillity, but interrupts it only in some particulars, as in the case of reprisals.

Before Great Britain commenced war with the States General, the States were a neutral nation with regard to the war between Great Britain, France, Spain, and America: they had taken no part in the war, and were a common friend to all. This is precisely the legal idea of a neutral nation: it implies two nations at war, and a third in friendship with both. The war which Great Britain commenced with the States General was a perfect war: it destroyed the national peace of the States General, and with it the neutrality of the nation. The States became a party in the general war against Britain: they were no longer a common friend to the belligerent powers; and therefore they ceased to be a neutral nation.

War having thus destroyed the neutrality of the States General, they can never resume the character of a neutral until they are in circumstances to resume the character of a common friend to Great Britain, France, Spain, and America: but this character is not to be acquired while war subsists between them and Great Britain. Only a peace, therefore, between Britain and the States, can put the States in a capacity to resume their original character of neutrality. But there can be no peace without the concurrence of both nations: the British could not therefore, by the mere authority of their proclamation, restore back to the ship *Resolution* her original neutrality. The proclamation could only operate as a protection of the ship from British capture.

We, therefore, lay out of question the ordinance of Congress with regard to the rights of neutrality; this case is not within it. But the ship *Resolution* is captured and both ship and cargo are libelled as prize. A question is made; on whom lies the *onus probandi?* We think on the captors. There can be no condemnation without proof that the ship or cargo is prize; and it cannot be expected, that the persons who contest the capture will produce that proof.

Every capture is at the peril of the party. A privateer is not authorized to capture every vessel found on the high sea: she is commissioned to capture only such ships as are the property of the enemy. Every ship indeed may, in time of war, be brought to and examined; but she is not to be seized and captured, without the captors have just grounds to think she is the property of an enemy, and not the property of subjects of a nation in peace and friendship, or neutrality. If such seizure and capture are made without just grounds, the party injured is entitled to have an action for damages: and it is the policy of all nations at war to oblige the captains of privateers to give bond and security, to enforce a proper conduct while at sea, and to prevent seizures and captures from being wantonly made.

The sea is open to all nations: no nation has an exclusive property in the sea. Put the case then, that a privateer meets a ship at sea; is it to be inferred, from the mere circumstance of the ship's being found on the high seas, that she is the property of an enemy? Surely there is no ground for such an inference: on this ground a privateer might seize and capture the ships of its own nation. But the privateer attacks, seizes, captures, and brings the ship into port: it is plain here is an act of violence; a seizure and capture. The captain therefore must do two things: at all events he must show just grounds for the violence, or he will be punishable at law by an action of damages: and in the next place, before he can obtain condemnation, he must prove the ship to be the property of an enemy; for, it can never be enough for condemnation, that he found the ship at sea.

The captors say: "That in the present case they had not only just grounds for seizure; but they have also just grounds for condemnation: for both the ship and cargo were found in the possession of British subjects, and therefore British property."

It must be admitted that possession is presumptive evidence of property; because possession is a circumstance which generally accompanies property; and, therefore, the seizure and capture, in the present case, was a violence at all events justified by the law of nations, and for which no action would lie, even on acquittal of the ship and cargo. But the possession in this case is no ground for condemnation: for what is the nature of presumptive evidence? It only has the force of evidence whilst it remains uncontested. The possession is clearly accounted for: the ship came into the hands of the enemy by capture; and the prior possession was in the hands of Dutch subjects, and not British subjects. The presumption therefore relied on by the captors is defeated, and the argument founded on the possession is in favor of the claimants.

On the question of prize or no prize, what evidence does the law of nations admit for the determination of it?

The national interest of every commercial country requires, that some mode or criterion be adopted to ascertain the ship, cargo, destination, property, and nation to which such ship belongs; not only as a security for a fair commerce according to law; but as a guard against fraud and imposition in the payment and collection of duties, imposts, and commercial revenues. The peace also and tranquillity of nations equally require, that the like criterion should be adopted, to distinguish the ships of different countries found on the high seas in time of war; to prevent an indiscriminate exercise of acts of hostility, which may lay the foundation of general and universal war. Hence

it is, that every commercial country has directed, by its laws, that its ships shall be furnished with a set of papers called ship papers: and this criterion the law of nations adopts, in time of war, to distinguish the property of different powers, when found at sea; not indeed as conclusive, but presumptive evidence only. Bills of lading, letters of correspondence, and all other papers on board, which relate to the ship or cargo, are also considered as *primâ facie* evidence of the facts they speak; because such papers naturally accompany such a mercantile transaction.

Such then is the evidence which the law of nations admits on a question of prize or no prize; and it is on this evidence that vessels with their cargoes are generally acquitted or condemned: and therefore, if in this case the papers on board affirm the ship and cargo to be such property as is not prize, there must be an acquittal, unless the captors are able, by a contrariety of evidence, to defeat the presumption which arises from the papers, and can show just grounds for condemnation. On the other hand, if the papers affirm the ship and cargo to be the property of an enemy, there must be a condemnation, unless they who contest the capture can produce clear and unquestionable evidence to prove the contrary.[1]

[1] In *The Nuestra Señora de Regla*, 1882, 108 U. S. 92, the court said: "The duty of a captor is to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court may, in case of restitution, decree demurrage against him as damages. This rule is well settled. *Slocum* v. *Mayberry*, 2 Wheat. 1; *The Appollon*, 9 Wheat. 377; *The Lively*, 1 Gall. 315; *The Corier Maratimo*, 1 C. Rob. 287." See also *Jecker* v. *Montgomery*, *supra*, for the power to establish a Prize Court, and see also *Fay et al.* v. *Montgomery*, 1852, 1 Curtis, 266, as well for the duty to send in the prize for adjudication as for circumstance excusing delay. In *Hooper, Adm'r*, v. *U. S.*, 1887, 22 Ct. Cl. 408, 439, Davis, J., says: "The distinction must not be forgotten between a legal and justifiable seizure and an illegal and unjustifiable condemnation. The seizure of a vessel may be successfully defended upon grounds which would not support a subsequent condemnation and 'prize courts deny damages when there was probable cause for the seizure, and are often justified in awarding to the captors their costs and expenses,' even when the vessel and cargo are decided not good prize and returned to their owners. *The Thompson*, 3 Wall. 155; *Jecker* v. *Montgomery*, 13 How. 498; *Murray* v. *The Charming Betsey*, 2 Cr. 64." And later in discussing the burden of proof, the same learned judge says: — "The burden of proof in prize proceeding is on the seized vessel. The authorities concur in this general statement, but the principle is not technical and is not pushed beyond its proper natural intent. Seized vessels always appear before the court under the taint of suspicion; that taint it is incumbent upon them to remove, as it is in their power alone to do so. What the court looks for is the fact. If it appears that the vessel was innocently pursuing an honest and legal voyage, whether that appear by papers or otherwise, then the vessel should be released. No particular paper, no specified character of evidence is marked out and defined as indispensable to attain this end. A case is easily supposable in which a merchant vessel has lost its papers by accident, or by theft, or by robbery committed by a pirate or privateer, or through suppression by

COMMODORE STEWART'S CASE.

United States Court of Claims, 1864.

(1 *Court of Claims*, 113.)

Casey, C. J., delivered the opinion of the court:

The claimant sets forth in his petition that, on the 20th February, 1815, he was a captain in the navy of the United States and was in command of the United States frigate *Constitution*. That on that day he overtook, on the high seas, about sixty leagues from the island of Madeira, the British ships-of-war *Cyane* and *Levant* and engaged them; and, after a sharp conflict of forty minutes, they surrendered to him and he took possession of them as prizes of war. He proceeded with them and his own ship to the island of St. Iago, in the possession of the troops, and subject to the dominion of the prince regent of Portugal, with whom the United States was then at peace, and who had issued a declaration of neutrality between the belligerents, — the United States and Great Britain.

Having come to anchor in the port of Praya, on the 10th of March, 1815, and while he was preparing to divest himself of the prisoners taken on the *Cyane* and *Levant* by sending them to Barbadoes, he discovered on the following day, off the port, a squadron consisting of three British ships-of-war, the *Leander*, *New Castle*, and *Acasta*; but which, in consequence of the prevalence of a dense fog, were not discovered until within three miles, and standing in for anchorage. Being apprehensive that the enemy would not respect the immunity afforded by a neutral port, Captain Stewart put to sea with the *Constitution* and his prizes, and the squadron immediately gave chase.

the captor, and it could not be admitted — the fact of their non-production being explained, and the vessel's honest character being shown — that because some particular document was not on board she therefore should be condemned and confiscated. The *onus probandi* is on the captured vessel; which means no more than that she must explain away suspicious circumstances."

In the ship *Tom*, 1894, 29 Ct. of Cls. 68, 97, it is held that a belligerent, seizing a neutral vessel upon mere suspicion, is responsible for the vessel, and is excused for her loss only where it is caused by unavoidable casualty. In *The Caroline Wilmans*, 1892, 27 Ct. of Cls., it was held that captors are not liable for loss, without their fault, of a vessel seized and held as contraband of war.

For the duties of captors, see *The Anna Maria*, 1817, 2 Wheat. 328, 332; *The Vrouw Johanna*, 1803, 4 C. Rob. 348, 351; *The San Juan Baptista*, 1803, 5 C. Rob. 33; *The Zee Star*, 1801, 4 C. Rob. 71; *The Felicity*, 1819, 2 Dod. 381, 383; *The Lencade*, 1855, Spinks, 217, 221; *Der Mohr*, 1802, 4 C. Rob. 314; *Die Fire Damer*, 1805, 5 C. Rob. 357. — Ed.

After about an hour's chase, finding the *Cyane* sailing dull and dropping down on the *Acasta*, he signalled her to tack, which she immediately did, doubled the rear of the enemy and afterwards arrived safely at New York. The enemy took no notice of the *Cyane's* change of course, but continued the pursuit of the *Constitution* and *Levant*. Soon after he discovered the *Levant* dropping down in the same way that the *Cyane* had done, and he ordered her also to tack, which she did. The enemy continued the chase after her, cut off her retreat, and forced her back into the port of Praya, where she came to anchor close to the battery. She was in this position when the enemy's ships stood in, fired at her, and forced her to surrender, took possession of her, and carried her out of the harbor, without the Portuguese authorities attempting to hinder or prevent them, or offering any resistance or remonstrance to the violation of the neutral rights and sovereignty of Portugal.

The claimant further alleges that the United States had a clear and undoubted claim upon the Portuguese Government for allowing hostilities to be carried on and recapture of the ship made within her neutral territory; and that the claim of the claimant and his crew was recognized by Mr. Crowninshield, Secretary of the Navy, in a letter addressed to the claimant on the 13th June, 1816.

He further avers that in the years 1850 and 1853 he called the attention of the Secretary of State of the United States to the case, and that the replies assured him that the matter should receive the attention and consideration which its importance demanded.

The petition also alleges that claimant memorialized Congress on the same subject, and that the Naval Committee of the House of Representatives, in 1816, reported against the payment of the whole value of the *Levant* to the officers and crew of the ship *Constitution*, but recommended the passage of an act giving them the sum of twenty-five thousand dollars, which should be deducted from the whole value, if the United States recovered it from Portugal. The value is alleged to have been one hundred thousand dollars. The act passed by Congress is in the following words:

"An Act rewarding the officers and crew of the *Constitution* for the capture of the British sloop-of-war *Levant*: —

"Be it enacted," &c., "That the President of the United States be and hereby is, authorized to have distributed as prize money, to Captain Charles Stewart, late of the frigate *Constitution*, his officers and crew, the sum of twenty-five thousand dollars, for the capture of the British sloop-of-war *Levant*; and that the sum of twenty-five thousand dollars, out of any money in the treasury not otherwise appropriated, be and the same is hereby appropriated for the purpose aforesaid."

This act was approved 26th April, 1816 (3 Stat. 301), and the money was paid according to its provisions.

The petition also avers that he and those for whom he claims are citizens of the United States, and can have no redress against the Portuguese Government, from whom the indemnity is due; that it was and is the duty of the United States to prosecute and enforce the claim, on their behalf, against Portugal, and on the recovery of the amount to distribute the same to him, his officers and crew; that there was a convention between the two governments in 1851 for the adjustment of the claims of citizens of the United States against Portugal, in which this claim was not included, and that by having relinquished the claim without the authority or consent of claimants, or failed to prosecute and enforce it, the United States became liable to pay it themselves.

The 5th and 6th sections of the Act of Congress approved 23d April, 1800 (1 Stat.), in force at the time of the capture of these vessels, gave the captors the whole of the captured vessels, where they were superior in force to the vessel making the capture. The *Cyane* was libelled in the Admiralty Court at New York and duly condemned as good and lawful prize to the captors. The claimant contends that by the capture of the *Levant* the prize vested in him and his crew; that the recapture under the circumstances alleged was illegal, and that Portugal was liable to the United States, and they to the claimants, for the value of the prize.

To this petition the solicitor of the United States has demurred, and assigns for cause of demurrer: —

1st. That the petition sets forth no valid ground of claim.

2d. That it does not appear that the United States had released Portugal, or relinquished any claim the plaintiffs have upon her for indemnity.

There can be little doubt that the facts set forth in the petition — and on this demurrer they must be taken as true — show that the officer in command of the British squadron was guilty of the violation of the neutral rights of Portugal in making her territory the scene of conflict with and capture of this vessel. For such an insult to her sovereignty and invasion of her just rights as a neutral, she had just grounds, under the law of nations, to claim indemnity and reparation from Great Britain. It is equally clear, we think, that the United States had the right to insist upon indemnity from Portugal for this invasion of her right of asylum in a neutral port.

Hostilities began or continued in a neutral territory must violate the rights of sovereignty of the neutral power, and therefore the law of nations forbids the belligerent power to begin or continue hostilities

in the territory or ports under the dominion of the neutral sovereign. Marten's Law of Nations, bk. 6, ch. 6, § 6.

For this reason, when two vessels, enemies of each other, meet in a neutral port, or one pursues the other into such port, not only must they refrain from all hostilities while they remain there, but should one set sail, the other must not sail in less than twenty-four hours afterwards. Moser's Grundlehren, ch. 21, § 25, p. 269.

And because foreigners can do nothing in a territory against the will of the sovereign, it is unlawful to attack an enemy in a neutral country, or commit in it any other act of hostility. The Dutch East India fleet having put into Bergen, in Norway, in 1666, to avoid the English, the British admiral had the temerity to attack them there. The governor of the town fired upon the assailants, and the Danish Government made it the subject of grave complaint, as being in violation of her neutrality and injurious to her honor and dignity as an independent and neutral sovereignty. Vatt. bk. III. ch. vii. § 132.

Belligerent powers must be exercised within the belligerent territory, on the high seas or on territory belonging to no one; and all hostilities exercised within the territorial jurisdiction of the neutral power are unlawful, and are strictly prohibited by the law of nations. Wheat. L. of Nat. p. 713–14. It follows that all captures made within such neutral territory are absolutely void. *Ibid.* 715. Bynkershoek indeed mentions an exception to this rule in the case of an hostile vessel met at sea, which he says in the pursuit may be chased into the neutral territory; but he is not sustained by any writer of authority or by the adjudications of the prize courts. "When the capture within the neutral territory is established," says Sir William Scott, "it overrules every other consideration, — the capture is done away; the property must be restored, notwithstanding it may actually belong to the enemy." *The Vrouw Anna Catharina*, 5 Rob. 15; Wheat. Law of Nations, p. 722.

So far has this doctrine been carried that it is held to be a violation of the rights of sovereignty of the neutral power to issue a belligerent commission within a neutral country, or to equip and fit out cruisers in such country, or to augment the force of a belligerent ship in a neutral port. In all these, and the like cases, if captures are subsequently made on the belligerent territory, or the high seas, and the prizes are brought into a port of such neutral country, restitution will be decreed and enforced by the tribunals of the country whose neutrality has been violated. *Talbot* v. *Jansen*, 3 Dall. 133; *The Alesta*, 9 Cranch, 359; *The Estrella*, 4 Wheat, 298; *The Arragonte Barcelones*, 7 Wheat. 496; *La Conception*, 6 Wheat. 235; *The Santa Maria*, 7

Wheat. 490; *The Santissima Trinidad*, 7 Wheat. 233; Abbot on Shipping, p. 34, in note; *The Anna*, 5 Rob. 373.

These authorities, and many others that might be cited, show very clearly that the acts and proceedings of the British officer in command of the squadron were unlawful, and the recapture of the *Levant*, under the circumstances and in the place it occurred, a high-handed and unjustifiable proceeding. But Portugal alone had a right to complain of his conduct to the government he represented, and in whose behalf he committed the act. The claimant, through the government of the United States, whose flag he carried, could only complain to Portugal of her conduct in failing, through weakness, timidity, or favor to our enemy, to maintain her neutrality, and secure to our citizens the protection they had a right to expect from a neutral sovereign within his territory.

So far as the case before us develops the facts, it does not appear that Portugal ever obtained from Great Britain any reparation or indemnity for this act, and it is certain that the United States received none from Portugal. Whether the claimant can maintain this suit against the United States will depend upon whether the claimants had such a right in the captured ship as required the United States to prosecute and enforce it against Portugal. And also whether, if the United States released and relinquished the claim on considerations of public policy, they became liable for the amount to the claimants.

The argument on behalf of the claimants assumes that the captors had a right and title to the captured ship, and of which they were illegally divested or deprived.

There is no doubt if this vessel had reached a port of the United States she would have been condemned as a good prize to the claimants; for the *Cyane*, taken in the same engagement and at the same time, was actually so condemned. The title to property lawfully taken in war may, upon general principles, be considered as immediately divested out of the original owner and transferred to the captor. As to personal property, it is considered as lost to the owner as soon as the enemy has acquired a firm possession, which is in general considered as taking place after the lapse of twenty-four hours, or after the booty has been carried into a place of safety, *infra præsidia*. Grotius, Lib. III. cap. 6, § 3; cap. 9, § 14; Klüber Droit des Gens. Moderne de l'Europe, § 254; Vattel, bk. III. cap. 14, § 196; cap. 14, § 209; Heffter das Europäische Völkerrech, § 136.

It is upon authorities like the foregoing that the right and title of the claimants in the present case is predicated. But these general expressions refer to the time when the title of the original owner is divested, rather than when the right of the individuals making the

capture vests. Attention for a moment to the foundation and origin of the right of the individual to the captured property will assist us in the solution of this question. That right is acquired not in virtue of the seizure of it as enemies' property, but by grant of the sovereign whose commission the captor bears. Judge Story says: "It is now clear that all captures in war inure to the sovereign, and become private property only by his grant." *The Emulous*, 1 Gall. 569; 11 East. 619.

The right all to captures from the earliest times has vested primarily in the sovereign, and no individual can have any interest in a prize, whether made by a public or private armed vessel, except that which he receives from the bounty of the State. Law of Marine Warfare, p. 374; Valin Com. II. 235; Bynk., cap. 17; Sir L. Jenkins's Work, p. 714. An interest in a prize can only be derived from the government. 1 Phillips on Insurance, 182, § 320; *The Joseph*, 1 Gall. 558; 11 East. 428. It is even denied that the individual captors, prior to condemnation, have any insurable interest in the captured property. *Routh* v. *Thompson*, 11 East. 432; *De Vause* v. *Steele*, 6 Bingh. N. C. 370; *Lucena* v. *Crawford*, 3 B. & P. 75; 5 Id. 323; *Crawford* v. *Hunter*, 8 T. Rep. 13.

The principle applicable to this case to be extracted from the authorities cited is, that by the capture of this ship the property to it vested in the United States, and whatever right to or title in it the claimants acquired must be derived from their sovereign authority. Such a grant is set up under the act of Congress approved the 23d April, 1800, § 5, which is as follows:

"The proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture." Bright. Dig. p. 665, pl. 78.

The property of the original owner cannot be considered as fully divested until there has been a condemnation by a regular prize tribunal having jurisdiction of the subject-matter. Until such adjudication is made, the right of recapture continues, as well as the right of *post liminii*. And in case the captured vessel escapes, is recaptured, or is voluntarily discharged, the jurisdiction of the prize court is lost, and all rights acquired by the capture are divested. 1 Kent's Com. 359. The Supreme Court of the United States say: "The right of capture is a limited right, is derived from the law, and is subject to all the restrictions the law imposes, and is to be exercised in the manner in which its wisdom has prescribed." *The Thomas Gibbons*, 3 Cranch, 421.

The question of prize may always be contested, either on account of

the character of the vessel or cargo, the conduct of the captors, or the place and circumstances where and under which the capture was made; and until their right is established by the sentence of a competent tribunal, the captors are not invested with the property. Vincen's Exposition raisonnée de la Legislation Commerciale, ch. 17.

A citizen may seize the property of an enemy wherever found, and it rests with the sovereign whether he will ratify and consummate the capture by proceeding to condemnation. Per Story, J., *The Emulous*, 1 Gall. 556.

These authorities are very full and conclusive that this capture, whatever right it conferred or property it changed, was in favor of the United States. It remains to inquire what property or interest the individual captors acquired by the surrender of the ship and her conveyance to this neutral port. The claimants contend that under the act cited they were once invested with the right to the vessel, that it operated as an immediate transfer of the right of the United States to them. Such a position is assumed, we think, without due attention to the form of the grant and the character of the grantor. It being the grant of the sovereign, it is contrary to the general rule to be most strongly against the grantee and in favor of the grantor. It can only take effect when its stipulations, limitations, and conditions have been complied with. The act prescribes that those vessels or cargoes "*which shall be adjudged good prize*" shall be the property of the captors. This, of course, upon the rule we have stated, excludes all such as have not been adjudged good prize; for *expressio unius, est exclusio alterius*. The title depends upon a grant, and must conform to it and comply with its conditions. The condition in this case is, that it shall be brought in and condemned as lawful prize before any title accrues. Chief Justice Taney says: "All captures *jure belli* are for the benefit of the sovereign under whose authority they were made; and the validity of the seizure, *and the question of prize or no prize*, can be determined in his own courts only upon which he has conferred jurisdiction to try the question." *Jecker* v. *Montgomery*, 13 How. 515. To the same effect is the judgment and opinion of Sir William Scott. That eminent admiralty judge says: "All grants of the sovereign are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives, rights, and emoluments of the sovereign being conferred upon him for great purposes and for public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant beyond what such grant *by necessary and unavoidable construction shall take away*." *The Rebekah*, 1 C. Rob. 230.

The case which bears most strongly on the question in hand is the judgment of the same great jurist in the case of *The Elsebe*, 5 Rob. 173. In that case there was a capture of a vessel *jure belli*. She was brought into an English port and libelled, but before adjudication, on the application of the diplomatic representative of the nations whose citizens were principally interested, the executive government of Great Britain directed the lords of the admiralty to release the ship and hand her over to the original owners. The case rose on a motion in the High Court of Admiralty to proceed to adjudication upon the rights of the captors, notwithstanding the release and discharge of the ship. The grounds taken on the part of the libellants were that the Crown had not the right to release; because such a right and interest had vested in the captors at the time of seizure, under the grant of prize, &c., as to entitle them to proceed to adjudication, notwithstanding an order of release on the part of the government. In delivering the opinion, that great judge says: "It is admitted on the part of the captors that their claim rests wholly on the order of council, the proclamation, and the prize act. It is not (as it cannot be) denied that, independent of these instruments, the whole subject-matter is in the Crown, as well in point of interest as in point of authority. Prize is altogether a creature of the Crown.

"No man has or can have any interest but what he takes as the mere gift of the Crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown; and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our Constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject, *bello parta cedunt reipublicæ*. It is not to be supposed that this wise attribute of sovereignty is conferred without reason; it is given for the purpose assigned, that the power to whom it belongs to decide on peace or war may use it in the most beneficial manner for the purposes of both.

"A general presumption arising from these considerations is, that government does not mean to divest itself of this universal attribute of sovereignty, conferred for such purposes, unless it is so clearly and unequivocally expressed. In conjunction with this universal presumption must be taken also the wise policy of our peculiar law, which interprets the grants of the Crown, in this respect, by other rules than those which are applied in the construction of the grants of individuals. Against an individual it is presumed that he meant to convey a benefit with the utmost liberality that his words will bear. It is different to

the public in which person an interest remains, whether in the grantor or the taker. With regard to the grant of the sovereign it is far otherwise. It is not held by the sovereign himself as private property; and no alienation shall be presumed except that which is clearly and indisputably expressed."

Having shown that all prizes vest in the Crown — that the right of the captors rests only on the gift of the Crown, in the order in council, the proclamation, and the prize acts — he proceeds to show that it was merely a right to seize and bring in for adjudication a certain description of property, and that the interest of the captors in the prizes only vested when condemnation took place, and that prior to such time the sovereign could dispose of them as he saw proper, without impinging upon the vested rights of the people.

If these principles are sound, and we think they are sustained by the strongest reasons and the highest authorities, it must follow that this suit cannot be maintained by this claimant, for want of title to and interest in the subject-matter in respect of which the claim is made.

By the seizure of the ships they acquired a right to carry them into a port of this country for adjudication. It is the condemnation under the act which gives the interest, and not the seizure. The capture vests it in the United States — the condemnation in the captors. It follows, as a necessary consequence from this, that there never having been a condemnation by a competent tribunal, there never has been any legal right vested in the claimants. Nor could there be any such, for it required the judgment of a competent prize tribunal to vest that right in them under the act of Congress. No other court is competent to supply the want of it, because that is an essential condition of the grant, and cannot be supplied by anything else. What follows then? Simply this, that when the *Levant* was permitted to be unlawfully recaptured by the Portuguese Government, in violation of the rights of hospitality, as well as her neutrality, the sole right to and interest in the captured prize was in the United States alone. The injury was committed against her rights; and whether she should demand reparation in any form, or to any extent, was a matter to be dictated and controlled by considerations of public interest and policy alone, and not by any considerations of private interest or grievance, for none existed.

The case of the brig *Armstrong*, decided by a majority of this court some years ago, has been pressed upon our attention as ruling this case. We do not think so. The question upon which this case is ruled did not and could not arise in that case. There was no question of prize in that cause. It was the destruction of a ship owned by

private individuals. I may, however, be permitted to say for myself, that the very able opinion delivered by Judge Gilchrist has failed to satisfy me of the soundness of the conclusion reached in that case.

Congress seems to have taken much the same view of the questions involved that we do now when they passed the act giving the claimants the sum of twenty-five thousand dollars for the capture of the *Levant*. That the capture was an act of general merit and heroism is universally admitted. And we confess that it would have afforded us sincere gratification if the law and the facts of this case had permitted us to convey a more substantial acknowledgment of the great services rendered by the venerable and illustrious commander of the *Constitution* and his gallant crew, who have contributed so much to make our flag respected on the seas, and to the lasting renown of our country. But we are restrained and guided by the law of the case, leaving all other considerations for that department of the government to which they appropriately belong.

We, therefore, are compelled to sustain the demurrer and dismiss the petition.[1]

THE "FLAD OYEN."

High Court of Admiralty, 1799.

(1 *C. Robinson*, 114.)

Judgment. — Sir W. Scott : [2] —

This is the case of a ship taken by a French privateer, and carried into the port of Bergen in Norway, where it appears she underwent a sort of process, which terminated in a sentence of condemnation, pronounced by the French consul; and under that sentence, she is asserted to have been transferred to the present neutral proprietor.

But another question has arisen in this case, upon which a great deal of argument has been employed; namely, whether the sentence of condemnation which was pronounced by the French consul, is of

[1] This is the second occasion on which the famous frigate appeared in court. The other case of *The Constitution* will be found *ante*, 218. For a description of the naval battle out of which Commodore Stewart's Claim arose, see Hollis, *The Frigate Constitution* (1901), pp. 196–215.

It may be of interest to note that Stewart remained in active service until he was retired as senior commodore in 1856 and flag-officer in 1860; that on July 16, 1862, he was commissioned rear-admiral in his eighty-fourth year, and that he remained on waiting orders until his death, in 1869. His fighting qualities as well as his name appeared in his grandson, the late Charles Stewart Parnell. — Ed.

[2] The statement of facts and part of the judgment have been omitted. — Ed.

such legal authority as to transfer the vessel, supposing the purchase to have been *bona fide* made? I directed the counsel for the claimants to begin; because, the sentence being of a species altogether new, it lay upon them to prove that it was nevertheless a legal one.

It has frequently been said, that it is the peculiar doctrine of the law of England to require a sentence of condemnation, as necessary to transfer the property of prize; and that according to the practice of some nations twenty-four hours, and according to the practice of others bringing *infra presidia*, is authority enough to convert the prize. I take that to be not quite correct; for I apprehend, that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary; and that a neutral purchaser in Europe, during war, does look to the legal sentence of condemnation as one of the title-deeds of the ship, if he buys a prize vessel. I believe there is no instance in which a man having purchased a prize vessel of a belligerent, has thought himself quite secure in making that purchase, merely because the ship had been in the enemy's possession twenty-four hours, or carried *infra presidia*: the contrary has been more generally held, and the instrument of condemnation is amongst those documents which are most universally produced by a neutral purchaser; that if she has been taken as prize, it should appear also that she has been, in a proper judicial form, subjected to adjudication.

Now, in what form have these adjudications constantly appeared? They are the sentences of courts acting and exercising their functions in the belligerent country; and it is for the very first time in the world, that in the year 1799, an attempt is made to impose upon the court a sentence of a tribunal not existing in the belligerent country, but of a person pretending to be authorized within the dominions of a neutral country: in my opinion, if it could be shown, that, regarding mere speculative general principles, such a condemnation ought to be deemed sufficient; that would not be enough; more must be proved; it must be shown that it is conformable to the usage and practice of nations.

A great part of the law of nations stands on no other foundation: it is introduced, indeed, by general principles; but it travels with those general principles only to a certain extent: and, if it stops there, you are not at liberty to go farther, and to say, that mere general speculations would bear you out in a further progress: thus, for instance, on mere general principles it is lawful to destroy your enemy; and mere general principles make no great difference as to the manner by which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and

allows some, and prohibits other modes of destruction; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes.

Now, it having been the constant usage, that the tribunals of the law of nations in these matters shall exercise their functions within the belligerent country; if it was proved to me in the clearest manner, that on mere general theory such a tribunal might act in the neutral country; I must take my stand on the ancient and universal practice of mankind; and say that as far as that practice has gone, I am willing to go; and where it has thought proper to stop, there I must stop likewise.

It is my duty not to admit, that because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution; merely because general theory might give it a degree of countenance, independent of all practice from the earliest history of mankind. The institution must conform to the text law, and likewise to the constant usage upon the matter; and when I am told, that before the present war, no sentence of this kind has ever been produced in the annals of mankind; and that it is produced by one nation only in this war; I require nothing more to satisfy me, that it is the duty of this court to reject such a sentence as inadmissible.

Having thus declared that there must be an antecedent usage upon the subject, I should think myself justified in dismissing this matter without entering into any farther discussion. But even if we look farther, I see no sufficient ground to say, that on mere general principles such a sentence could be sustained: proceedings upon prize are proceedings *in rem;* and it is presumed, that the body and substance of the thing is in the country which has to exercise the jurisdiction. I have not heard any instances quoted to the contrary, excepting in a very few cases which have been urged, argumentatively, in the way which is technically called *ad hominem*, being cases of condemnations of British prizes carried into the ports of Lisbon and Leghorn; but in those the condemnations were pronounced by the High Court of Admiralty in England. The only cases are of two ships carried into foreign ports, and condemned in England by this court; the very infrequency of such a practice shows the irregularity of it. Upon cases in the practice of other nations antecedent to the present war, the advocates have been silent.

Now, as to these condemnations of prizes carried to Lisbon and

Leghorn, it has been said, that if the courts of Great Britain venture this degree of irregularity, other countries have a right to go farther. That consequence I deny: the true mode of correcting the irregular practice of a nation is, by protesting against it; and by inducing that country to reform it: it is monstrous to suppose, that because one country has been guilty of an irregularity, every other country is let loose from the law of nations; and is at liberty to assume as much as it thinks fit.

Upon these ports of Lisbon and Leghorn it is to be remarked, that they have a peculiar and discriminate character, a character that to a certain degree assimilates them to British ports: the British exist there in a distinct character, under the protection of peculiar treaties; and with respect to Portugal, those treaties go so far as to engage, that if a ship belonging to one country shall be brought by its enemy into the ports of another, which happens to be at peace, this neutral country shall be bound to seize that ship, and restore it to its ally: to be sure no covenant can have more the effect of giving the ports of England and Portugal a reciprocal relation of a very peculiar sort — to make the British ports Portuguese ports, and the Portuguese ports British ports to a certain degree. Now, unless I am given to understand that peculiar treaties between France and Denmark have impressed such a distinctive character upon the port of Bergen, I cannot allow that it can be considered, on the mere footing of general neutrality, to be a French port, exactly in the same manner in which London may be considered as a Portuguese port, or Lisbon as a British port.

But supposing this possible, still it would not follow that such condemnations could be pleaded as authorities in the present case; because, in the first place, the validity of such condemnations themselves may be the subject of reasonable doubt. For it by no means appears that the enemy, or neutrals, who might have an interest in contesting them, have ever acknowledged their validity. Whoever purchases under such sentences must be content to purchase them subject to all the questions that may arise upon their sufficiency.

But, 2dly, Supposing that no doubts could be entertained respecting the sufficiency of such sentences; it by no means follows that the efficacy of the present sentence can be supported: there the tribunal is acting in the country to which it belongs, and with whose authority it is armed. Here a person, utterly naked of all authority except over the subjects of his own country, and possessing that merely by the indulgence of the country in which he resides, pretends to exercise a jurisdiction in a matter in which the subjects of many other States may be concerned. No such authority was ever conceded by any country to a foreign agent of any description residing within it: and

least of all could such an authority be conceded in the matter of prize of war — a matter over which a neutral country has no cognizance whatever, except in the single case of an infringement of its own territory; and in which such a concession of authority cannot be made without departing from the duties, and losing the benefits, of its neutral character.

Mark the consequences which must follow from such a pretended concession: observe in the present case how it would affect the neutral character of the ports in the north! If France can station a judge of the Admiralty at Bergen, and can station there its cruisers to carry in prizes for that judge to condemn; who can deny that to every purpose of hostile mischief against the commerce of England, Bergen will differ from Dunkirk, in no other respect than this, that it is a port of the enemy to a much greater extent of practical mischief. To make the ports of Norway the seats of the French tribunals of war, is to make the adjacent sea the theatre of French hostility.

It gives one belligerent the unfair advantage of a new station of war, which does not properly belong to him; and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

Wisely, therefore, did the American Government defeat a similar attempt made on them, at an earlier period of the war: they knew that to permit such an exercise of the rights of war, within their cities, would be to make their coasts a station of hostility.[1]

Whether the government of Denmark has shown equal vigilance in observing, or equal indignation in repelling the attempt, is more than I am warranted to assert: but though the publicity of the transaction in the town of Bergen may subject the police of that place to some degree of observation, I see nothing in the papers which issue immediately from the royal authority that at all affects the government itself with the knowledge and approbation of the fact; and indeed it would be indecent to suppose that a country, standing upon the footing of ancient and friendly alliance to this country, could have given its sanction to a measure so full of hostility to its friend, and of possible inconvenience to itself: I must, therefore, deem the act of

[1] The incident referred to was the attempt in 1793 of the French minister, "Citizen" Genêt, to offer commissions to citizens of the United States to cruise in the service of France against Great Britain, to fit out privateers, to set up French consular prize courts, so that prizes brought in could be condemned in American ports, and otherwise to employ the territory of this country for belligerent purposes. 5 Moore, Int. Arb. 4404–4411; Taylor, Int. Law, § 640. See also Hall, Int. Law, § 213. — Ed.

this French consul a licentious attempt to exercise the rights of war within the bosom of a neutral country, where no such exercise has ever been authorized.

ODDY v. BOVILL.

King's Bench, 1802.

(2 *East*, 473.)

In the war between Great Britain and France, Spain was in 1799 an ally of the latter power. A prize was taken by a French privateer, carried into a port of Spain, and condemned as enemy's property by a French court sitting in Spain.[1]

Lawrence, J.: — The question is, Whether this sentence of condemnation be conclusive evidence that the property insured was British, and consequently, that the warranty of its being neutral was not complied with? The argument was attempted to be carried into a wider field than we think it fit now to enter into, since the case of *Hughes* v. *Cornelius*, T. Ray. 473; Skin. 59, and 2 Show. 232, and a long string of authorities which have followed that decision. We must now therefore take it for granted, that if this sentence were given by a court of competent jurisdiction, it is conclusive upon the point then in judgment, namely, against the neutrality of the property. The case of the *Flad Oyen* has been made the basis of the argument, to show, that unless the prize court were constituted according to the law and practice of nations, it could have no jurisdiction. If there were no other case on the subject determined by the same learned judge, to explain how far he meant to go in that case, it might be doubtful, from some expressions there used, whether it did not extend to a case circumstanced like the present: but if we look at his other decisions on this subject, particularly in that of the *Christopher* [2 C. Rob. 209], though I do not mean to say that it is directly in point, it sufficiently appears from the reasons assigned by him in giving judgment, to what extent he meant the doctrine laid down by him in the *Flad Oyen* case should be understood; and that he did not intend to deny the legality of such sentences of condemnation by the captors in the country of a co-belligerent or ally in the war; because, as he observes, there is a common interest between such on the subject, and both governments may be presumed to authorize any measures conducing to give effect to their arms, and to consider each other's ports as mutually subservient. This very

[1] Short statement substituted for that of original report. — Ed.

question appears to have arisen in several subsequent cases; and in the case of the *Betsy Kruger*, in August, 1800, seems to have been considered by the advocates as so thoroughly understood and settled, that the question of law was waived, as one not to be discussed; and the court, proceeding on the ground that the condemnation was legal, directed further proof to be made of the fact of the transfer. We find then this question already determined by a court having peculiar jurisdiction in cases of this sort, of which we have only incidental jurisdiction. That determination therefore is as conclusive on us, as to the proper rule of decision, as a judgment of the common law courts on a question of real property would be on the civil law courts.

Le Blanc, J.: — The subsequent cases referred to are explanatory of the opinion delivered by Sir W. Scott in the case of the *Flad Oyen*, and show that he considered that there was a material distinction between a sentence of condemnation, pronounced by the authority of the capturing country in the state of a co-belligerent, and one so pronounced in a neutral country. Now this is the case of a sentence of condemnation in the country of a belligerent power, an ally of the captors; and is exactly like the cases of *The Harmony*, 2 Rob. 210 n., the *Adelaide* [Id.], and the *Betsy Kruger* [Id.]. The first was a condemnation by the French commissary of marine at Rotterdam, of a British prize taken and carried into Helvoetsluys, which was in the country of a belligerent ally; which was so far considered as different from the case of such a court sitting in a neutral country, that the neutral claimant was directed to go into proof of the merits as to the transfer, reserving the question of law. And in the last mentioned case of the *Betsy Kruger*, the point was considered to be so settled, that the advocates waived the discussion of it, and the court considered the condemnation as legal. That I consider as a case directly in point, to support the legality of a condemnation in the country of a belligerent ally. This court therefore must decide the question consistently with the opinion of a court of peculiar jurisdiction on the same point, until we are told by a superior tribunal that that determination was improper. Judgment of nonsuit.[1]

[1] In *Donaldson* v. *Thompson*, 1808, 1 Camp. 429, 431, Lord Ellenborough said: "While a government subsists as this did [Corfu under Russian occupation], we cannot look to the degree in which it might be overawed by a foreign force. The sentence was pronounced by a belligerent on neutral territory, and is therefore void." A decision of a prize court sitting in a neutral state does not condemn and therefore passes no vaild title. *Flad Oyen*, 1799, *supra*. While the prize should be brought into captor's port and there passed upon by a prize court, the physical presence of the prize is not necessary: it may be in the port of a neutral, on the high seas, or at the bottom of the seas, *Hudson* v. *Guestier*, 1808, 4 Cr. 293; especially *The Invincible*, 1814, 2 Gall. 27, 39. The decision of a prize court is necessary to pass title to the

DALGLEISH v. HODGSON.

COMMON PLEAS, 1831.

(5 *Moore & Payne*, 407.)

Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:[1] —

The principal question in this case is, whether the sentence of condemnation of the brig *George*, and her cargo, in the Prize Court at Monte Video, dated the 13th of December, 1826, is to be received in our courts as conclusive evidence of the fact, that the ship was captured in attempting to break the blockade of Buenos Ayres? For, if that is to be taken as a fact conclusively proved, then the plaintiffs in this action are in no condition to recover; not upon the count for capture and detention, because such capture was occasioned by the voluntary act of the master, in violation of the law of nations; nor upon the count for barratry, because it appears upon the whole evidence, that the master, supposing him to have broken the blockade, acted honestly and *bona fide;* his conduct being attributable rather to ignorance, or want of caution, than to such fraudulent design as is necessary to constitute the crime of barratry.

The general law upon this subject is well known, that the sentence of a foreign Court of Admiralty, of competent jurisdiction, is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such fact appears on the face of the sentence, free from doubt and ambiguity. But it is, at the same time, as well established, that, in order to conclude the parties from contesting the ground of condemnation in an English Court of law, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty, whether the ship was condemned upon one ground, which would be a just ground of

individual captor and the decision of a competent prize court having jurisdiction binds the world. For, in the language of Lord Kenyon, C. J: "In general there is no doubt that the sentence of a Court of Admiralty is conclusive, as to the points which it proposes to decide; it was so ruled in the case of *Hughes* v. *Cornelius* (32 Chas. II.), 2 Show. 232; and that has been acknowledged to be law ever since." *Christie* v. *Secretan*, 1799, 8 Term R. 192, 196.

Other cases on this elementary point are: *Havelock* v. *Rockwood*, 1799, 8 Term R. 268; *The Kierlighett*, 1800, 3 C. Rob. 96; *The Falcon*, 1805, 6 C. Rob. 194; *The Invincible*, 1816, 1 Wheat. 238; *Wheelwright* v. *Depeyster*, 1806, 1 Johns. 471; *Page* v. *Lennox*, 1818, 15 Johns. 172. — ED.

[1] Statement of the case omitted as the judgment sufficiently states the facts. — ED.

condemnation by the law of nations, or on another ground, which would amount only to a breach of the municipal regulations of the condemning country. The cases of *Fisher* v. *Ogle*, 1 Camp. 418, and *Calvert* v. *Bovill*, 7 Term Rep. 523, are express authorities to this point: and the sentence of condemnation in the latter case bears a strong resemblance to that in the present. There, Lord Chief Justice Kenyon said: "If, indeed, that court had stated in their sentence, that they condemned the goods, because they were British property, I should have considered myself bound by their sentence; but they have assigned other reasons for their adjudication. The express grounds of the sentence of condemnation are, that the ship was destined for one of the West India Islands; that she was hired and loaded at London, and had a certain quantity of gunpowder on board: therefore they condemned her and her cargo as good prize." The sentence in that case was: "Forasmuch as the true destination of the said vessel was for the English islands, having been hired and loaded at London, and that there has been found on board her eighty barrels of gunpowder, the court declares the said brig to be a good prize for the benefit of the captors."

Now, looking at the adjudicatory part of this sentence, which is the important part for the discovery of the precise ground of condemnation, it is in these terms, viz.: "From all which, and from what the documents state, I judge the said brig *George* and her cargo to be good and lawful prize to the capturers."

The words "from all which" refer us back to the premises, to discover the grounds of the sentence; and, in these premises, we find enumerated three distinct statements: first, "that it plainly appears from all the documents, that the brig sailed from Liverpool knowing of the blockade, and which the captured do not even deny, nor that her destination was Buenos Ayres, at a short distance from which she was taken; secondly, that, for the reason last given, she ought to be considered as violating the blockade; thirdly, that the ship had not even the plausible excuse of coming to Monte Video first, and thereby complying with the published instructions." Now, upon referring to these premises, we think we cannot safely infer that the precise ground of condemnation was the attempt to break the blockade. The first statement refers to the illegality of the ship's destination from Liverpool to Buenos Ayres, then being under blockade. It is impossible to say with certainty that the sentence may not have proceeded on that ground, in part, if not altogether. It is more than probable it did so; for, in another part of the premises, the Judge reverts to this statement in these terms: "Forasmuch as besides not doing away the proof that Buenos Ayres was the first port the shipment was destined

for, in itself criminal." But, if this was the ground on which the sentence proceeded in the first place, it is no ground for condemnation by the law of nations, unless there was an intention to violate the blockade; and, in the next place, the sentence leaves untouched the question of fact, whether the blockade was broken, or attempted to be evaded. If it formed an ingredient in the judgment of the Brazilian Court of Admiralty, no one can say how much it weighed with them, or that, if this ground of condemnation had been out of the case, the court intended to rely on the fact of the blockade being broken as their ground of adjudication. Again, in the latter part of the preamble to the sentence, the judge refers to a non-compliance with published instructions, as a charge against the master of the ship. What these instructions are, does not appear; whether some regulations ordained by their own authority or not, is uncertain. But, if this, which is no ground of condemnation by the general law of nations (*Mayne* v. *Walter*, E. T. 22 Geo. 3; Park on Insur. 6th ed. 474), operated on the mind of the foreign judge to condemn the ship and cargo, there is an end again to the conclusive finding of the fact, that the ship violated the blockade of Buenos Ayres.

Still further, the terms in which the fact of the violation of the blockade is adverted to in the preamble of the sentence, are far from direct and declaratory, but afford, at most, an inference that the judge felt himself warranted in drawing such a conclusion. "For this reason," says the judge, "she ought to be considered as violating the blockade, and which she would have effected but for the diligence of the captors."

Under a sentence, therefore, expressed with so much doubt and ambiguity as to the real ground on which it proceeded, we hold ourselves at liberty to determine, whether, upon the evidence given at the trial, such violation of the blockade did in fact take place or not; and, upon that question, we are satisfied on the evidence, that the captain did not break, nor did he intend to break the blockade, but that he honestly intended to obtain instructions from the blockading squadron, not having been before warned off by any of the Brazilian cruisers.

The only remaining objection that has been insisted on against the plaintiffs' right to recover is, that the voyage in question was an illegal voyage in its commencement, because the ship was destined to a port which was notified to be under blockade. But that this was not an illegal voyage was determined so lately by the Court of King's Bench (*Naylor* v. *Taylor*, 9 Barn. & Cress. 718; s. c. 4 Man. & Ry. 526), upon a voyage described in the policy in the very same terms as the present, and under circumstances so precisely similar, that it is unnecessary for us to say more, than that we entirely concur with the judgment

there given, founded, as it is, upon the authority of Lord Stowell's judgment in the case of *The Shepherdess*, 5 Rob. Adm. Rep. 262.

We therefore think the verdict should stand, and that judgment should be entered for the plaintiffs.

Judgment for the plaintiffs.

CUSHING, ADMINISTRATOR, v. THE UNITED STATES.

United States Court of Claims, 1886.

(22 *Court of Claims*, 1.)

Davis, J., delivered the opinion of the court:[1] —

The jurisdictional act requires us to inquire into legal condemnations, and it is urged on behalf of the defendants that all condemnations by the French courts are final and conclusive upon this court if the French court had jurisdiction. Many citations are made in support of this contention, among them is the case of *Baring and others* v. *The Royal Exchange Assurance Company*, 5 East. 99 *et seq.*, which may be taken as a fair illustration.

The American ship *Rosanna*, insured by the defendants, was captured and condemned by the French, whereupon the plaintiffs sued on the policy and recovered. Lord Ellenborough, Ch. J., interrupting the argument, said:

"Does not this (French) sentence of condemnation proceed sufficiently on the ground of infraction of treaty between America and France in the ship not having those documents with which in the judgment of the French court the American was bound by treaty to be provided? I do not say that they have construed the treaty rightly; on the contrary, suppose them to have construed it ever so iniquitously; yet, having competent jurisdiction to construe the treaty, and having professed to do so, we (the court) are bound by that comity of nations which has always prevailed amongst civilized states to give credit to their adjudication when the same question arises here upon which the foreign court has decided. After arguing for hours, we

[1] The facts of the case are omitted, and only part of the opinion is given relating to decisions of prize courts. In this connection reference should be made to the elaborate and closely reasoned opinion on the finality of judgments of prize courts, delivered by the celebrated William Pinkney, Commissioner, in *The Betsey*, 1797, 3 Moore, Int. Arb. 3180–3206. Mr. Wheaton pronounced Pinkney's opinions (delivered while a member of the Board of Commissioners under Art. VII. of Jay's Treaty, Nov. 19, 1794) "finished models of judicial eloquence, uniting powerful and comprehensive argument with a copious, pure, and energetic diction." — Ed.

must come to the same conclusion at last, that the French court has specifically condemned the vessel for an infraction of treaty which negatives the warranty of neutrality. Then, having distinctly adjudged the vessel to be good prize upon a ground within their jurisdiction, unless we deny their jurisdiction, we are bound to abide by that judgment. Whenever a case occurs of a condemnation by a foreign court on the ground of *ex parte* ordinances only, without drawing inferences from them to show an infraction of treaty between the nation of the captors and captured, and referring the judgment of the court to the breach of treaty, I shall be glad to hear the case argued, whether such ordinances are to be considered as furnishing rules of presumption only against the neutrality, or as positive laws in themselves, binding other nations *proprio vigore.*"

The decision of the English court, then, goes to this extent, that in an action between individuals the decree of the French court which had jurisdiction is final; so would it also be final as to the vessel, and the purchaser at the confiscation sale could rest upon the decree as good title against all the world.

But all this does not affect the position of the United States Government against the government of France.

Lord Ellenborough says that no matter how iniquitous the construction given the treaty by the French court, he, as a judge, is bound to follow it. But so is not the government of the United States. That government could have objected that either the court was corrupt, or that there existed no treaty, or that there had been manifest error in construing it. All such questions may be outside the right of a court to consider, but they are within the right and form part of the duty of the political branch of the government. If the French court, acting within its jurisdiction, construed the treaty iniquitously, the courts might not have power to remedy the wrong, but the owner had a right to appeal to his government for redress, and that government, when convinced of the justice of his complaint, was bound to endeavor to redress it.

The decree is an estoppel on the courts, but it is no estoppel on the government; in fact, the right to diplomatic interference arises only after the decree is rendered. Of course, precedents for cases of this kind are not to be found in the reports of courts, for no such case can, in the nature of things, come before a court unless by virtue of a special and peculiar statute, such as that under which we now act; but diplomatic history is full of them.

Rutherforth (Institutes, Vol. II. ch. 9, p. 19), speaking of the right of a state to proceed in prize, says:

"This right of the state to which the captors belong to judge

exclusively is not a complete jurisdiction. The captors who are its own members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons. But the other parties in the controversy, as they are members of another state, are only bound to submit to its sentence as far as this sentence is agreeable to the law of nations, or to particular treaties, because it has no jurisdiction over them in respect either to their persons or of the things that are the subject of the controversy. If justice, therefore, is not done them, they may apply to their own state for a remedy; which may, consistently with the law of nations, give them a remedy either by solemn war or by reprisals." See Dana's Wheaton, 391.

This brings us naturally to another point, admitted as a general principle, that appeal should not be prosecuted to the court of last resort before there can be diplomatic intervention.

The exceedingly able British-American commission which sat in Washington in 1872 not only unanimously decided that they had jurisdiction in prize cases in which the decision of the ultimate appellate tribunal of the United States had been had, a conclusion in which even the agent of the United States concurred, but also that they had jurisdiction when the claimant had not pursued his remedy to the court of last resort, provided satisfactory reasons were given for the failure to appeal. Papers relating to the Treaty of Washington, Vol. VI. pp. 88–90. To this last conclusion the American commissioner dissented; but even he held that a misfeasance or default of the capturing government, by which means an appeal was prevented, was sufficient to excuse the failure to appeal. Id. 92.

The rights of the prize courts are the rights of the capturing state. These courts are its agents, deputed by it to examine into the conduct of its own subjects before becoming answerable for what they have done, and the right ends when their conduct has been thoroughly examined. Therefore the state has a right to require that the captor's acts be examined in all the ways which it has appointed for this purpose, and on this principle is founded the doctrine that the complainant, unless he exhaust his appeal, shall be held to confess the justice of the decision. This pre-supposes, first, that there are appellate courts; second, that they are open to the complainant freely and honestly. The captor has no right to insist for his own protection upon the fulfilment of a form which he by his own acts prevents.

There is also a distinction, not often clearly drawn, between the validity of a claim *per se* and the right to enforcement. The justice of the claim is founded upon the injustice of the sentence. The appeal does not affect the merits of the claim; it does not palliate or destroy

any wrong done; but it is simply a course provided for the captor's protection, that he may fully examine into the acts of his own agents, through his other agents, the courts.

"The whole proceeding, from the capture to the condemnation, is a compulsory proceeding *in invitum* by the state in its political capacity, in the exercise of war powers, for which it is responsible, as a body politic, to the state of which the owner of the property is a citizen." Dana's Wheaton, note 186.

Therefore the capturing state may waive such demand, and not insist upon exhausting its right to further investigation, and may waive it by failing to provide an appellate tribunal, or by preventing recourse to it, or in any other way which shows an intention not to insist upon this right of examination; but appeal or no appeal, the validity of the claim is founded upon the injustice to the claimants.

All writers lay down the principle that appeal should be taken from the inferior to the superior tribunal before resort by the injured government to measures of redress; but this principle is always coupled with the extreme measures of war and reprisals (see Rutherforth, *supra;* Grotius, bk. III. ch. 2, 4, 5), and there is no assertion in the writers that illegal capture necessarily does not found an international claim, even when appeal has not been taken.[1]

[1] It has generally been held that the commander of a belligerent cruiser has no right to decide controverted questions arising in cases of prize. He seizes a vessel on the belief or suspicion that she is enemy's property, or that she is engaged in a forbidden commerce, it is left to the prize court of the captor's country to determine whether these suspicions are warranted or not.

Captain Semmes, of the Confederate steamer *Sumpter*, and later commander of the *Alabama*, seems to have turned his cabin into a prize court on the occasion of every capture made by him.

During his cruises in the *Sumpter* and the *Alabama*, Captain Semmes had occasion to adjudicate in more than seventy cases of prize; in fifty-nine of these cases, ship and cargo were condemned as enemy's property, and burned; in nine cases the ships were released on ransom bonds, the cargoes being plainly neutral. But in a large number of the cases of those condemned and burned, there were claims for the cargoes as neutral property. Captain Semmes seems to have condemned the cargo, unless there was positive proof of its neutrality. This practice was carried on by him and others for four years, and was acquiesced in by neutral nations, who permitted their ships to be searched and their property adjudicated upon by these commanders. They received them into their ports, and supplied them with provisions and coal. Who shall say, herefore, that hereafter a prize court may not be established on the deck of every belligerent man-of-war, the commander constituting such court?

The following is a specimen of Captain Semmes' procedure, taken from his own memorandum.

Case of the *Lafayette* ("Cruise of the Alabama," I. 346): —

"Ship and cargo condemned. The cargo of this ship was condemned by me as enemy's property, notwithstanding there were depositions of the shippers that it had been purchased by them on neutral account. These *ex parte* statements are precisely

such as every unscrupulous merchant would prepare, to deceive his enemy and save his property from capture."

After an extended discussion of the case, showing that there was fraud, and that the neutrality of the cargo was not established, Captain Semmes continues: —

"3d Phillimore, 599, to the effect, that 'further proof' is always necessary where the master cannot swear to the ownership of the property (as in this case). And as I cannot send my prizes in for adjudication, I must of necessity condemn in all cases where 'further proof' is necessary, since the granting of 'further proof' proceeds on the presumption that the neutrality of the cargo is not sufficiently established; and where the neutrality of the property does not fully appear from the ship's papers and the master's deposition, I had the right to act upon the presumption of enemy's property."

Again, in the case of the *Express* (Id. 167), in which ship and cargo were condemned. "It must be admitted that this is a case in which, perhaps, a prize court would grant 'further proof;' but as I cannot do this, and as a distinct neutral character is not impressed upon the property by former evidence, I must act under the presumption of law. See 3d Phill. 589."

The following is an extract from the "Cape Argus," giving an interview with Captain Semmes: —

"You English people won't be neighborly enough to let me bring my prizes into your ports and get them condemned, so that I am obliged to sit here a *court of myself*, try every case, and condemn the ships I take."

For the constitution, functions, and procedure of prize courts, see: 1 Dana's Wheaton, note 186, pp. 480–487; Lawrence's Wheaton, 960–976; 2 Halleck, 392–431; 3 Phillimore's Int. Law, 648–769; Benedict's Admiralty Practice, 3d ed. §§ 509–512. — Ed.

INDEX — DIGEST.

The Syllabus is referred to by sections; the *text* by pages.

Abandonment of territory once occupied, § 36.

Acquisition of territory by accretion, § 39.

Acquisition of territory by conquest or cession; the loss of territory, § 40.

Adams, J. Q., on recognition of independence, 44–45 n.

Adula, The, — *de facto* and *de jure* blockade considered and held *inter alia* that occupation of blockaded port does not raise blockade, 826.

Agent — in enemy's country, if appointed before war, may transact business for principal. — Small's Adm'r *v.* Lumpkin's Ex'x, 538: § 143.

Alabama claims — neutral port may not be used for building, equipping, or basis of supplies for either belligerent, 713.

Aliens — residing within United States may by the law of nations be expelled therefrom — Fong Yue Ting, 382; are aliens exempt from military duty? § 64.

Alleganean, The, — enclosed bays, such as the Chesapeake and Delaware, not high seas, 143.

Allegiance — expatriation, 370–375.

Allegiance — at common law subject may not change without permission of State — Æneas Macdonald, 370; Williams' case, 372.

Ally — recapture of property of, *see* Recapture.

Ambassadors — act for preserving privileges of, 4; *see also* Diplomatic agents.

American Insurance Co. *v.* Canter — cession of territory changes public not private rights, 657.

Amicable settlement of disputes and attempts to mitigate the harshness and hardships of war, §§ 112, 113, 114.

Amory *v.* McGregor — American citizen allowed to withdraw his goods from England after outbreak of war between United States and Great Britain, 561.

Ann Green, The ship — property may not change character in transit, nor does neutrality of shipper protect property consigned for delivery to enemy's port, 620.

Anna, The — capture within territorial waters of neutral is illegal and vessel should be restored by prize court of captor, 684.

Anna Catharina, The — goods shipped to become property of enemy on arrival, condemned, 612.

Anne, The — capture in neutral waters is good as between enemies, rights of neutral nation are, however, violated. If captured vessel begins hostilities in neutral waters, claim to protection lost, 688.

Antoine *v.* Morshead — bills of exchange drawn by prisoner of war in enemy country on subject of home country held valid, 573.

Antonia Johanna, The — freight properly charged upon whole cargo, *i. e.* upon that restored as well as upon that condemned, 632.

Arbitration, § 112.

Arbitration award — award under arbitration treaty has force of law, — La Ninfa, 443.

Arbitration, Permanent Court of, — first decision of — The Pious Fund Case, 449 n.

Archives — works of art, etc., not subject to capture in war, § 159.

Armed forces and ships of war in foreign territory are exempt from local jurisdiction, § 56.

Arming and equipping vessels of war in neutral territory, § 174.

Armistices, § 146.

Arms, ammunitions — delivered to insurgent vessel in United States ports, held not violation of United States neutrality laws, United States *v.* Trumbull, 731; sale of, by United States to belligerent, held legal, 747 n.; sale of munitions of war by a neutral State, § 176.

Art, works, of — not subject to capture in war, § 159.

Articles of Confederation, 1777, 10.

Asylum, right of, §§ 60–62; 256–273; does not exist ordinarily in legations except in Central and South American Republics, United States *v.* Jeffers, 256; and 257–258 n.; on men-of-war, § 61; on merchant ships, not permitted, § 62.

Atlas, The — goods placed on neutral vessels consigned to enemy port, or some other market, are enemy property and may be captured. In this case neutral vessels in voyage from Vigo to Seville held engaged in coasting trade of enemy, 895.

Atalanta, The — carriage of despatches to enemy port subjects ship to confiscation, 780.

Augmentation of force or equipment of belligerent cruiser is illegal; if prize captured after such augmentation, will be restored if brought within neutral waters, the Santissima Trinidad, 701, *see also* Equipment.

Bain *v.* Speedwell — capture made after treaty of peace invalid, 675.

Baiz, *In re* — diplomatic agents of all grades are exempt from suit, but consuls, although temporarily exercising diplomatic functions, are not, or need not be, so privileged, 197.

Balloons used in war, § 129.

Barbary States — how far subject to international law, The Helena, 45.

Bays — Bay of Fundy, open arm of sea, 153 n.; Chesapeake Bay, Delaware Bay, closed seas, The Alleganean, 143; if entrance to bay not more than six miles across, considered closed sea, The Alleganean, 143; bays and gulfs, § 49 b.

Beaver, The — master of vessel and boy allowed salvage on rescue of vessel from enemy, 653.

Beers *v.* Arkansas — sovereign may not be sued in his own courts without

his consent, and he may prescribe the terms on which suit may be brought; this applies equally to the United States and State of the union, 186.

Behring Sea Arbitration, *see* Ninfa, 443.

Belgenland, The — action arising from collision of two foreign vessels on the high seas may be maintained in United States (Admiralty) Court, 338.

Belligerency, rights flowing from, 758 n.; recognition of, § 24; views of Presidents Grant and McKinley on recognition of, 758 n.

Belligerent communities, § 23; succession to the rights of, § 27; relations of, after acquiring independence, to the contract rights and duties of the parent state, § 28; legal right to recognition by sovereign states, § 25.

Belligerents — pacific intercourse of, § 146; relations between, and neutrals, historical sketch of, § 172; right of, to interfere with neutral commerce, *see* Visit and Search, §§ 187–189; 858–899.

Benito Estenger, The — colorable transfer of enemy's property does not affect liability thereof to capture, 621.

Bentzen *v.* Boyle — unsold produce of enemy's soil is hostile, irrespective of domicile of owner of soil, 598.

Betsey, The — mere declaration by commander without actual investment will not constitute blockade, 798.

Bills of exchange — drawn by prisoner of war in enemy country on subject of home country held valid, Antoine *v.* Morshead, 573; not regarded as trading with the enemy, § 142.

Blackstone's Commentaries — law of nations is part of common law, 8.

Blair *v.* Silver Peak Mines — definition of citizenship and rights thereto appertaining, 376.

Blockade, 796–845; purpose of, § 182; absence of blockading fleet excuses entry and departure during such absence, The Nancy, 817; attempt to leave blockaded port subjects vessel and cargo to condemnation, The Johanna Maria, 803; *de facto* blockade, § 182; *de facto* and *de jure* blockade considered, and held *inter alia* that occupation of blockaded port does not raise blockade, The Adula, 826; notification, § 182; by notice, and blockade *de facto* when notice is required, The Neptunus, 796; in case of *de facto* blockade, runner must be taxed directly or indirectly with knowledge of its existence, The Franciska, 804; mere declaration by commander without actual investment will not constitute blockade, The Betsey, 798; master is agent for cargo as well as ship, therefore attempt of master to enter blockaded port affects cargo, The Panaghia Rhomba, 800; merchandise shipped by land or inland navigation from blockaded port, thence from port not blockaded, not liable to confiscation for breach of blockade, The Ocean, 819; neutral not forbidden to trade with blockaded port, but subjects property to capture and confiscation by so doing, The Helen, 821; effective blockade, § 182; blockade to be binding must be effective, presence of a single cruiser held sufficient, The Olinde Rodrigues, 835; vessel leaving blockaded port temporarily occupied by enemy not liable to capture; prohibition to import does not necessarily extend to export, The Gerasimo, 811; pacific blockade, § 115; penalty for breach of blockade — French rule, § 183.

Boedes Lust, The — definition and nature of hostile embargo, 460.

Bombardment of towns, § 162 ; fortified, open, § 128.
Booty, right to, § 160.
Bosphorus and Dardanelles, § 49 a.
Boundaries — between independent nations determined by political department, Foster *v.* Neilson, 75 ; between States of the American Union determined by judiciary, United States *v.* Texas, 76 ; political department of the government determines what are boundaries under treaties, § 44 ; determination of river-boundaries, § 45 ; determination in the cases of lakes and mountains, § 46.
Boussmaker, *Ex parte* — property in form of dividend arising from contract made before war held not liable to confiscation, 494.
Breach of blockade, American courts, § 186.
Brig Joseph, The — Citizen of United States residing in enemy country at outbreak of war may not bring back his property if it involves trade with enemy, 556.
Brig Sea Nymph, The — vessel sailing under convoy is presumed to remain under convoy and therefore liable to capture ; right of search implies right to use force if necessary in its execution, 869.
British Foreign Enlistment Acts, § 174 ; 693.
Brown *v.* United States — debts due the enemy and private property in country at outbreak of war confiscable by law of nations. In the United States, act of Congress necessary to confiscate them, 486, and 493 n.
Brussels Conference, § 114.
Buron *v.* Denman — exterritorial acts by order of the State, bind State, but not agent, 305.
Buttenuth *v.* St. Louis Bridge Co. — middle or main channel of river is dividing line or boundary, 121.

Canals, interoceanic: Suez, Corinth, Kiel, Panama, § 50.
Capitulations, § 146.
Capture — passes title to captor's country, but title only passes to individual captor by condemnation in prize court of captor's country, Commodore Stewart's case, 910.
Capture of property on land and sea — difference between, 899 n.
Carlos F. Roses, The — previous or subsisting liens on captured ship not respected in prize court, 637.
Carlotta, The — salvage on neutral property recaptured or rescued from enemy not given unless such property really exposed to condemnation, 650.
Caroline, The — State may abate a nuisance in foreign country, 67, and 319 n.
Carrington *v.* Merchant's Insurance Co. — contraband and penalty for carriage thereof, 769.
Cartels, § 116.
Castioni, *In re* — political offenders not extraditable, 285, and 293 n., 294 n.
Cession — of territory changes public not private rights, American Ins. Co. *v.* Canter, 657 ; territory definitely ceded to United States ceases to be foreign territory from ratification of treaty of cession, Fourteen Diamond Rings *v.* United States, 667 ; *see* Conquest.

Change of sovereignty, *see* Sovereignty, change of.
Chargé d'Affaires, *see* Diplomatic agents.
Charkieh, The — definition and nature of sovereign and semi-sovereign States (Egypt), 48.
Charming Nancy, The — who may sue on ransom bill, 568.
Chesapeake Bay — not a part of the high seas, The Alleganean, 143.
Chinese — status of, in United States, § 93; born in United States are citizens thereof, 379.
Chin King, *Ex parte* — Chinese born in United States are citizens thereof, 379.
Church *v.* Hubbard — municipal seizures may not be made beyond the three-mile limit, 343; The Itata, 344 n.
Citizen — duty of, to return home on outbreak of war, The William Bagalay, 565; American citizen may not bring back property from enemy's country eleven months after outbreak of war, The St. Lawrence, 559; American citizen may not send vessel to enemy's country after outbreak of war to bring away property, The Rapid, 557; American citizen on British vessel on high seas subject to jurisdiction of Great Britain, Regina *v.* Anderson, 331; American citizen permitted to withdraw goods from England after outbreak of war between United States and Great Britain, Amory *v.* McGregor, 561; citizen of United States residing in enemy's country at outbreak of war may not bring back his property if it involves trade with enemy, The Brig Joseph, 556; after outbreak of war, citizen may neither go in person nor send agent to enemy country to bring away his property, § 139; citizens residing in the enemy's country should return home on the outbreak of war, and should be granted reasonable time to withdraw their property and return, § 140.
Citizens — protection of, in foreign parts. Koszta's case, 400 n.; Tousig's case, 401 n.; a Prussian subject's case, 399 n.; slaughter house cases, 400 n.; De Bode *v.* Regina, 400 n.; Wagner's case, 400 n.; Hausding's case, 399 n.; Embden's case, 399 n.
Citizenship — Naturalization, 376–397, § 88; definition of citizenship and rights appertaining thereto, Blair *v.* Silver Peak Mines, 376; Littell *v.* Erie R. R. Co., 378; Chinese born in United States are citizens thereof, *Ex parte* Chin King, 379; citizenship does not attach upon declaration of intention by alien, Minneapolis *v.* Reum, 390; *In re* Moses, 396.
Civil War — definition of, § 118; Prize cases, 475.
Clayton-Bulwer Treaty, 1850, § 104.
Collision on high seas — action for may be maintained in United States (Admiralty) Court, The Belgenland, 338.
Colonial trade — coasting trade — extension in 1793, § 185.
Combatants, — who are lawful — conditions — authority — organization — dress, § 122.
Commercen. The — effect of carrying contraband on provisions, freight, and ship, 765.
Commercia belli, § 146.
Commercial domicile, 585–607; *see also* Domicile.
Commonwealth *v.* Blodgett — exterritorial acts by a state in self-defence, bar to action against agent, 308.

Commonwealth *v.* Blanding — crime committed in one state to take effect in another, punishable in latter, 300 n.

Confederate States, recognition of, 1861, § 26; legislative and judicial acts of, 61–63 n.; how considered by United States government, Home Insurance Co. case, 59.

Confederation, § 14; *see also* States.

Congo State — recognition of, § 19.

Conquest — Cession, § 171; works no change in private title to land, United States *v.* Moreno, 666.

Constitution of the United States, 1789, 11.

Constitution, The — ships of war exempt from civil and criminal jurisdiction of foreign port, 218.

Consuls — origin of office, function, appointment, dismissal, privileges, diplomatically accredited, "Lettres de Provision," *exequatur*, § 99; judicial functions in semi-civilized lands, § 100; not diplomatic agents, *In re* Baiz, 197; may not exercise jurisdiction in foreign port over crew of home ship unless authorized so to do by treaty, Ellis *v.* Mitchell, 234.

Consular courts — in foreign countries exercise jurisdiction by virtue of express treaty, *In re* Ross, 238.

Continuous Voyages, Colonial trade, and Coasting trade — extension in 1793, § 185; as applied in American civil war, The Stephen Hart, 852, and 857 n.; applied to carriage of contraband, § 186.

Contraband of war, 760–779; definition and kinds thereof, The Peterhoff, 760; carriage of, § 186; carriage of, does not, as a rule, involve confiscation of ship, The Neutralitet, 767; carriage of despatches to enemy port subjects ship to confiscation, The Atalanta, 780; carriage of enemy despatches to neutral port not contraband, The Madison, 785; carriage of despatches generally subjects vessel to capture, but loss of time and expenses only penalty if master not taxed with knowledge, The Rapid, 782; carriage of military persons in neutral vessel subjects vessel to confiscation, The Orozembo, 786; despatches and persons, as, § 181; 779–796; classification of, *res ancipitis usus*, occasional, § 179; provisions going to enemy's port of naval equipment may be treated as, The Jonge Margaretha, 762; The Commercen, 765; trade in, not illegal, Seton *v.* Low, 778; The Helen, 821; penalty for carrying, as to provisions, freight, and ship, The Commercen, 765; penalty for carrying, time when penalty attaches, rule of English and American courts, French rule, § 180; general law of contraband, § 178; and lists of contraband articles, 766–767 n.

Contracts — effect of war upon, between enemies made before the war, executed contracts, executory contracts, statutes of limitation, interest on debts, § 135; entered into with enemies during war by citizens residing in enemy's country, § 141; made during civil war for sale of property, real or personal, to aid Confederate States held void, Ware *v.* Jones, 517; and 520 n.; executory, if time is material and of the essence, are annulled by war. Life insurance policies are of this character, but assured is entitled to equitable value of policy at time of outbreak of war, New York Life Ins. Co. *v.* Statham, 512; and 516 n.

Contracts, private, 498–520.

Contributions and requisitions, § 161.

Convoy — vessel sailing under armed convoy to avoid visitation and search, subject to condemnation, The Maria, 858; The Nancy, 861; vessel sailing under convoy is presumed to remain under convoy, and therefore liable to capture, right of search implies right to use force, if necessary, in its execution, The Brig Sea Nymph, 869; *see also* search, right of; visit and search.

Cooley, *v.* Golden — river boundary is changed by accretion, but avulsion or sudden change, or abandonment of channel does not affect the boundary, 129.

Cornu *v.* Blackburne — ransom bills held either not trading or permissible trading with the enemy, so that recovery could be had in suit thereon, 566.

Crawford & McLean *v.* The William Penn — hypothecation of vessels in enemy port for purpose of repairs held not trading with enemy, 580.

Crawford *v.* The William Penn — voluntary, not involuntary trading with the enemy, illegal, 575.

Credentials of diplomatic agents, § 96.

Creole, The — internal order and regulation of merchant ship in foreign port held not subject to municipal law of such port, 252.

Crime — committed beyond the jurisdiction of United States not punishable in United States, United States *v.* Smiley, 302; committed within jurisdiction of foreign country not triable in United States, United States *v.* Davis, 294; committed in New York, not punishable in New Jersey, State *v.* Wyckoff, 296; and 300 n., 301 n.; committed in one state to take effect in another, punishable in latter, Commonwealth *v.* Blanding, 300 n.; Cutting's case, 301 n.

Cushing, Adm'r, *v.* United States — decision of prize court binds parties thereto, but does not estop government, which may proceed diplomatically against country of prize court for failure or miscarriage of justice, 927.

Cutting's case — crime committed in one country to take effect, and which actually does take effect, in another, punishable in latter, 301 n.

Dalgeish *v.* Hodgson — judgment of prize court conclusive in points necessarily involved and clearly upon face of sentence, 926.

Darby *v.* The Brig Erstern — though neutral vessel protects enemy goods on board, unneutral conduct will forfeit the protection, 896.

Deceit, how far permitted in war, § 129.

Declaration of Paris, 1856, § 134; 898 n.

Declaration of St. Petersburg, § 114.

Declaration of War — war without declaration, civil war, date of beginning of war, § 117.

Debts — interest on, § 135; of a state due enemy, and interest thereon, are not confiscable, § 132; due the enemy legally may be, but from motives of policy generally are not, confiscated, Hamilton *v.* Eaton, 481; Ware *v.* Hylton, 485 n.; due the enemy, and private property in country at outbreak of war, confiscable by law of nations. In United States act of Congress necessary to confiscate them, Brown *v.* United States, 486; and 493 n.

De Bilboa Packet, The — goods shipped in time of war, or in contemplation thereof, held to belong to consignee, if consignee enemy, property condemned, 609.

De Facto States, § 23; *see* States.

De Haber *v.* Queen of Portugal — foreign sovereign may not be sued without consent, 180.

De Jarnett *v.* De Giversville — sale of property within Northern lines held valid after publication of notice to parties within Confederate lines, 542.

Despatches and persons as contraband, § 181; *see also* Contraband.

De Wutz *v.* Hendricks — loan of money to insurgents illegal, 721.

Devastation — is it ever lawful? § 127.

Diplomatic agents — persons designated by the constitution of a state to manage its foreign affairs, department of foreign affairs, state department in the United States, § 95; rights of; refusal to receive; must be a *persona grata;* credentials; letters of credit; letters patent; full powers; instructions; passport, § 96; right of legation; rights, privileges, and duties of, § 53; rights and immunities of, in friendly states, on the way to and from their posts, § 98; immunities of, §§ 54, 55; *see also* Heathfield *v.* Chilton, 189; termination of mission, recall, and dismissal, § 97; may not be summoned as witness, Guiteau's Trial, 196 n.; exempt from criminal jurisdiction, 191 n.; exempt from civil jurisdiction, 192 n.; exempt from suit in third country, Wilson *v.* Blanco, 206; *see also* Ambassadors.

Discovery, acquisition of title by, Johnson and Graham's Lessee *v.* McIntosh, 71; § 34.

Dole *v.* Merchants' Mutual Marine Insurance Co. — definitions and kinds of war, 470.

Domicile — nature and definition of, Mitchell *v.* United States, 605; commercial, 585–607; time most important element, The Harmony, 585; effect of, and declaration of intention to become a citizen, upon nationality of foreigner; his relation to adopting state, when abroad, and protection it may accord him, § 91; what constitutes, how determined; *animus manendi;* time, § 118; national character of property in time of war depends upon the domicile of owner, French rule, § 147; American citizen domiciled in enemy country is enemy, and goods shipped before, but captured after outbreak of war, lawful prize, The Venus, 591; unsold produce of enemy soil is hostile, irrespective of domicile of owner of soil, Bentzen *v.* Boyle, 598; neutral merchant residing in enemy country treated as belligerent trader; enemy character, however, lost the moment he starts home, The Indian Chief, 588; property of persons residing within Confederate States during civil war, and engaged in commerce upon the sea, is enemy property and subject to capture, The Prize cases, 601.

Don Pacifico, Case of — country may protect its citizen abroad against denial of justice by resort to reprisals or war, if necessary, 45 n., 450.

Duty of subject or citizen to return home on outbreak of war, 556–565.

Elk *v.* Wilkins — Indian born within United States, but unnaturalized and untaxed, not citizen of United States, 398; § 93.

Ellis *v.* Mitchell — consul may not exercise jurisdiction over crew of home ship, unless authorized so to do by treaty, 231; § 58.

Emanuel, The — neutrals may not carry on trade, such as coasting trade, from which they are excluded in peace, 847.

Embargo, hostile, § 116; definition and nature of, The Boedes Lust, 460–463.

Enemy character, §§ 147–150; *see also* Domicile.

Enemy property — product of the enemy's soil takes national character of the country where it is produced, § 150; right to capture enemy goods in neutral vessels, and neutral goods in enemy vessels, § 190; enemy goods in neutral vessel protected, though unneutral conduct will forfeit the protection, Darby *v.* The Brig Erstern, 896; and 898 n.; found on the sea or in the ports of enemy, is confiscable as prize of war, § 134; found afloat in ports, on the breaking out of war, was generally confiscable as prize until recent time, § 131; compared with embargo, § 131; public property of the enemy, lands, buildings, archives, work of art, movable or personal property, § 159; private property, real and personal, as a rule, is not confiscable, at least not by way of booty, though personal property may be taken by way of contributions and requisitions, § 160; comparison of different rules applied to enemy property at sea and on land, § 160; immovable property, lands and houses, of the enemy within the limits of the other belligerent are never confiscated, § 133; goods placed on neutral vessel consigned to enemy port, or some other market, are enemy property and may be captured. In this case neutral vessels in voyage from Vigo to Seville held engaged in coasting trade of enemy, The Atlas, 895; *see* Enemy, trade of; Trade.

Enemy, trade of — goods placed on neutral vessel consigned to enemy port, or some other market, are enemy property, and may be captured, The Atlas, 895; *see* Enemy property.

Equality of states, § 15.

Equipment — augmentation of force or equipment of belligerent cruiser is illegal; prize captured after such augmentation will be restored if brought within neutral waters, The Santissima Trinidad, 701; of vessels of war in neutral territory, § 174.

Exchange of prisoners, § 124: *see also* Prisoners of war.

Expatriation — Allegiance, 370–375.

Exterritoriality — fiction of, § 59; origin and purpose explained, § 59.

Extradition — leading authorities and references on, § 71; interstate rendition, § 70; 274–293; of fugitives from justice, § 67; person extradited is triable for offence for which he was extradited, but for no other, § 67; states do not as a rule surrender person charged with political or military offences, § 69; as a person is extradited for the commission of a conventional crime, the nationality of criminal is immaterial; however, it is customary to exclude citizens of the contracting states from operation of the provision of treaty, § 68; states do not as a rule surrender their own citizens, Trimble's case, 293 n.; exists by virtue of treaty, and fugitive only triable for crime for which extradited, United States *v.* Rauscher, 274.

Extraterritorial — acts by order of the state bind state but not agent, Buron *v.* Denman, 305; McLeod's case, 67 n., 309 n.; acts of persons by order of their government, § 72; acts done by a state in self-defence, § 73; 308–319; acts by a state in self-defence bind state but not agent, Common-

wealth *v.* Blodgett, 308; The Caroline, 67, and 319 n.; The Virginius, 320 n., 322 n.

Extraterritorial crimes — *see* Offences committed abroad, jurisdiction of, § 65; *see also* Crime.

Fisheries — alleged right of the United States in the British-American, § 29; convention of 1818 between England and United States, § 104.

Fishing-boats — generally exempt from seizure, but exemption does not extend to vessels employed in the great fisheries, § 155.

Flad Oyen, The — judgment of prize court in neutral country does not change title, 919.

Flags of truce, § 146.

Fleming *v.* Page — goods imported into United States from Mexico during American occupation thereof subject to duty as imported from foreign country, 659.

Flindt *v.* Scott — insurance policy on licensed trade with enemy good, 526; and 529 n.

Florida, The — capture in neutral waters is unlawful, 699.

Fong Yue Ting — aliens residing within United States may, by the law of nations, be expelled therefrom, 382.

Forbes *v.* Cochrane — refusal to surrender or to aid in the delivery of slaves escaping to man-of-war, in foreign port, held not actionable, 258.

Foreign sovereigns, § 52; *see also* Sovereigns.

Foreigners — offences committed abroad by, § 65; exemption from military duty, § 64.

Fortuna, The — captor allowed freight for carriage of neutral property to place of destination, 631.

Foster & Elam *v.* Neilson — treaty is a contract between two or more nations; in the United States it is law of the land, 412; the political department determines questions of boundary between United States and foreign nations, 76.

Franciska, The — in case of *de facto* blockade, blockade runner must be taxed directly or indirectly with knowledge of its existence, 804.

Free ships, Free goods, § 190.

Freight — its nature considered and defined, Hooper, Adm'r, *v.* United States, 633; in the case of captured vessels, § 156.

Freight and liens, 629-648; captor allowed freight for carriage of neutral property to place of destination, The Fortuna, 631; freight properly charged upon whole cargo, *i.e.*, upon that restored as well as upon that condemned, The Antonia Johanna, 632; previous or subsisting liens on captured ship not respected in prize court, The Carlos F. Roses, 637; neutral carrier of enemy property generally allowed freight; in this case freight postponed to captor's law expenses, The Vrow Henrica, 629.

Fourteen Diamond Rings *v.* United States — territory definitely ceded to United States ceases to be foreign territory from ratification of treaty of cession, 667.

Fugitives from justice, *see* Extradition.

Furtado *v.* Rodgers,— insurance effected in Great Britain on French ship, previous to war between Great Britain and France, does not cover a loss by British capture, 549.

Geneva award, 715.
Geneva convention, § 125.
Geofroy *v.* Riggs — treaty as law of land subject, in the United States, to constitutional limitations, 413.
Gerasimo, The — vessel leaving blockaded port temporarily occupied by enemy not liable to capture; prohibition to import does not necessarily extend to export, 811.
Goodrich *v.* Gordon — contract for ransom of vessel held lawful contract, 571.
Grant, President, message of — expatriation, 374 n.
Grapeshot, The — during civil war, President possessed right as Commander-in-chief to establish provisional courts to try causes arising under laws of state and nation, 666 n.
Gray, Adm'r, *v.* United States — reprisals, definition and nature of, 452.
Griswold *v.* Waddington — partnership existing between citizens of belligerent states dissolved by outbreak of war; notice of dissolution unnecessary, 504.
Guarantee treaties, § 106.

Hague Conference, The, § 125.
Hamilton *v.* Eaton — debts due the enemy legally may be, but from motives of policy generally are not confiscated, 481.
Handly's Lessee *v.* Anthony — middle of river is boundary, unless, as in this case, parties determined otherwise, 116.
Hanger *v.* Abbott — statute of limitations ceases to run during war, 500.
Harcourt *v.* Gaillard — grants of American territory made by British authority after Declaration of Independence void, unless confirmed by treaty of peace, 70.
Harmony, The — in matter of domicile, time most important element, 585.
Haver *v.* Yaker — treaty dates from signing, in case involving individual rights, from ratification, 420, 421 n.
Heathfield *v.* Chilton — diplomatic agents and servants *bonâ fide* in their employ exempt from suit, but exemption does not apply to consuls, 189.
Heirn *v.* Bridault — definition of international law, 1.
Helen, The — municipal law does not forbid neutral to trade with blockaded port, but the law of nations subjects neutral property, in such case, to capture and confiscation, 821.
Helena, The — Barbary States, how far subject to international law, 45.
High seas — straits and lakes, part thereof, United States *v.* Rodgers, 132.
Hoare *v.* Allen — interest on debts suspended, not extinguished, during war, 498.
Home Insurance Company's case — the legal status of the Confederate States as defined by United States courts, 59.

Honduras, Republic of, *v.* Soto — state is a moral person, 24.
Hoop, The — trade with the enemy without license held void in admiralty court, 521.
Hooper, Adm'r, *v.* United States — treaties other than *in rem* extinguished by war, 433: *Ib.*, nature of freight considered and defined, 633.
Hostile expeditions, fitting out, § 173.
Hostile occupation, conquest, cession, 655–674; *see also* Occupation, Conquest, Cession.
Hypothecation of vessels in enemy's port for purpose of repairs, held not trading with enemy, Crawford & McLean *v.* The William Penn, 580.

Imina, The — contraband goods should be taken in voyage to enemy port; proceeds not generally liable on return voyage, 776.
Immanuel, The — neutrals may not engage in trade from which they are excluded in peace, 845.
Impressment of seamen, §§ 77, 189.
Incorporeal things — as debts, etc., invader's right over, § 167.
Indelible allegiance, § 87.
Independence, recognition of — views of J. Q. Adams, 44–45 n.
Indian Chief, The — neutral merchant residing in enemy country treated as belligerent trader; enemy character, however, lost the moment he starts home, 588.
Indians — status of, in United States, 398–412; § 94.
Insurance — on ships of the enemy, § 144: effected in Great Britain on French ship, previous to war between Great Britain and France, does not cover loss by British capture, Furtado *v.* Rodgers, 549; and 553 n.
Insurgents — aid to, 721–760, § 177; loans, munitions of war, § 177; may be held pirates for depredations against third powers, The Magellan Pirates, 351; loan of money to, illegal, Thompson *v.* Powles, 37; De Wutz *v.* Hendricks, 721; Kennett *v.* Chambers, 723; British vessel fitted out in aid thereof liable under British foreign enlistment act, The Salvador, 744; unrecognized (wrongly) held pirates in United States *v.* Ambrose Light, 346.
Interest on debts — suspended not extinguished during war, Hoare *v.* Allen, 498; § 135.
International law — or the law of nations, definitions of, § 1; origin of the terms "Law of Nations" and "International Law," § 2; is a branch of true law, § 3; nature and sources of, § 4; historical sketch of, § 5; is a part of the law of states, § 6; leading writers on, § 7; private, or the conflict of laws, § 8.
Interstate rendition — criminal may be tried for crime other than that for which he was extradited, State *v.* Patterson, 283.
Intervention — character and conditions of, § 83; on the ground of self-preservation for the protection of (1) institutions, (2) good order, (3) the external safety of the intervening state, § 84: against illegal or immoral acts; case of Greece, 1826; Bulgaria, 1876; Cuba, 1898; China, 1900; § 85; under a treaty of guarantee on invitation of one of the parties to a civil war, § 86; under collective authority of the body of states, § 86.

Jan Frederick, The — contract in contemplation of war or transfer of colonial produce *in transitu* illegal, 618.
Jecker *v.* Montgomery — neither president nor inferior executive officer can establish prize court in territory occupied by American troops, 644.
Jenkins, Sir Leoline — opinion of, on piracy, § 80; 345.
(La) Jeune Eugénie — definition of international law, 3.
Johanna Maria, The — attempt to leave blockaded port subjects vessel and cargo to condemnation, 803.
John, The Schooner — capture after declaration of peace invalid, 677.
Johnson & Graham's Lessee *v.* McIntosh — discovery followed by occupation gives title; European claims to American territory considered in the light of international law, 71; § 34.
Jones *v.* United States — recognition of the existence of a state, 38.
Jonge Margaretha, The — provisions going to enemy's port of naval equipment may be treated as contraband; vessel property of same owner condemned, 762.
Joseph, The, *see* The Brig Joseph.
Jurisdiction — on the high seas, 329–369; over passing vessels, § 63; is the jurisdiction of a state over its citizens and property on the high seas exclusive? § 75: are offences committed by citizens or foreigners, beyond the limits of a state, subject to the jurisdiction of its courts? § 65; criminal jurisdiction of state courts in the United States, § 66.

Keith *v.* Clark — internal changes do not affect identity of state in international relations, 28.
Kennett *v.* Chambers — political department recognizes independence; loan of money to insurgents illegal, 723.
Kershaw *v.* Kelsey — all trade across enemy lines without license illegal, 535.
Koszta's case — alien domiciled in United States, who has declared intention to become citizen, may be protected by United States in foreign country, 400 n.

Lakes — connected with open sea considered high seas, United States *v.* Rodgers, 132.
Law of nations — is part of common law, Blackstone's Commentaries, 8; *see* International Law.
Laws of war, §§ 119–129.
Legates, § 95; *see* Diplomatic Agents.
Legations, right of asylum in; *see* Asylum.
Legislation to give effect to treaties, § 107.
Letters of credence, § 96.
Letters patent, § 96.
Letters of marque and reprisal, § 123.
License — trade across enemy lines without, illegal, Kershaw *v.* Kelsey, 535; to trade, § 146; to trade must, as a rule, be granted by the supreme authority of the state, and must be granted or assented to by both belligerents,

§ 138; to trade must be substantially complied with, Williams *v.* Marshall, 530; and 530 n.; trade with the enemy without license held void in admiralty court, The Hoop, 521; trade with the enemy without license held void at common law, Potts *v.* Bell, 525; Flindt *v.* Scott, 526; to trade, in the United States by act of Congress conferred solely on President, 531; and 534 n.

Lilla, The — Prize courts of Confederate States did not pass title, 62 n.

Littell *v.* Erie R. R. Co. — who are citizens of the United States? 378.

Loans of money to belligerents, § 175; aid to insurgents, loans, § 177.

Lola, The — international law is part of municipal law of United States, 19.

(Le) Louis — slave trade not piracy *jure gentium*, 352.

Macdonald, Æneas — at common law subject may not change his allegiance without permission of state, 370; § 87.

McLeod's case — command of the state is bar to action against agent, 67, 309.

Madison, The — carriage of enemy despatches to neutral port lawful, 785.

Magellan Pirates, The — insurgents may be held pirates for depredations against third powers, 351.

Mail steamer — not exempt from capture, The Panama, 788.

Mare clausum and *mare liberum*, § 49.

Marginal seas — jurisdiction over passing vessels in, Queen *v.* Keyn, 154; and note to case.

Maria, The — vessels sailing under armed convoy to avoid visitation and search subject to condemnation, 858.

Marianna Flora, The — held *inter alia* that vessel suspected of piracy may be visited, searched, and captured by any nation; right of search in other cases does not exist in peace, it is belligerent right, 873.

Maritime War, § 123; requisitions and contributions in land wars; will they be resorted to in maritime wars? § 161.

Marque and reprisal — letters of, § 123.

Mary Ford, The — property captured but abandoned by enemy rescued by neutral liable to salvage, 642.

Matthews *v.* McStea — The civil war did not of itself dissolve partnerships between citizens of North and South; dissolution was effected by President's proclamation of Aug. 16, 1861, 508.

Mediation, § 113.

Mentor, The — capture after declaration of peace invalid, 676.

Merchant vessels, 225–255; jurisdiction over, on the high seas, § 78; of the United States on high seas subject to jurisdiction of United States, Wilson *v.* McNamee, 329; theory of the territoriality of, § 76; in foreign ports, subject to jurisdiction thereof, United States *v.* Diekelman, 264, and 273–275 n.; in foreign port always subject to municipal law of such port; *but see* The Creole, 252; national character of, and their transfer during war from a belligerent to a neutral, § 153; proofs of the national character of, § 154; do not, as a rule, enjoy exemption from local jurisdiction in foreign ports; the exemption, if it exist, is the result of a special custom based upon a tacit or express renunciation of territorial sovereignty, § 58;

subject, unless exempt by express treaty, to civil and criminal jurisdiction of foreign port; French rule otherwise, Wildenhus' Case, 225, American citizen on British vessel on high seas subject to jurisdiction of Great Britain, Regina *v.* Anderson, 331; vessel owned by British subjects subject in Chilian waters to Chilian jurisdiction, on high seas to British jurisdiction; Chilian prisoners may therefore bring action for false imprisonment on arrival in British port, Regina *v.* Lesley, 337; *see also* Ships of war.

Mexico, Republic of, *v.* Arrangoiz — foreign state or sovereign may sue in state or federal courts, 170.

Military occupation, *see* Occupation, military.

Miller *v.* The Resolution (1) — The mere capture or illegal capture of property does not pass title to captor, 899.

Miller *v.* The Resolution (2) — judicial proceeding in prize court necessary to pass title; evidence required for condemnation comes, in first instance, from ship and its papers, 906; and 909 n.

Ministers, *see* Diplomatic agents, Ambassadors.

Minneapolis *v.* Reum — declaration of intention does not clothe alien with rights of citizenship, 390.

Mississippi, navigation of, § 42.

Mitchell *v.* United States — nature and definition of domicile, 605.

Mob violence — injury to foreigners by, 320–328, and 328–329 n.; responsibility for injury to foreigners by civil commotions and, § 74; New Orleans not responsible for injury to foreigners by, New Orleans *v.* Abbagnato, 320; United States government liable by international if not by constitutional law for, 328–329 n.

Moses, *In re* — rights of citizenship do not attach by mere declaration of intention, 396.

Municipal seizures — may not be made beyond the three-mile limit, 343; Church *v.* Hubbard, The Itata; beyond the three-mile limit, § 79.

Munitions of war, *see* Arms, Ammunitions.

Nancy, The — absence of blockading fleet excuses entry and departure during such absence, 817.

Nation — definition and character of, 36 n.

Nationality — doctrines of indelible allegiance and expatriation, § 87; of children born abroad, of illegitimate children, of married women, § 90; persons destitute of, "Heimatlosen," § 92; *see also* Domicile.

Naturalization — condition of a naturalized citizen who subsequently returns to his native land; § 89; *see also* Citizenship.

Navigation of rivers, *see* Rivers, navigation of.

Navy, volunteer, § 123.

Neptunus, The — blockade by notice and blockade *de facto;* when notice is required, 796.

Nereide, The — neutral may charter and ship goods on armed belligerent vessel; is not responsible for resistance of belligerent vessel provided said neutral did not aid in armament or resistance, 884; *Ib.*, definition and nature of reprisals, 451.

Neustra Señora de los Dolores — right of claimant upon declaration of peace revived unless property condemned or forfeited, 681.

Neutral duties, §§ 173–177.

Neutral nations — will not take jurisdiction of captures made by belligerent men-of-war, United States *v.* Peters, 697.

Neutral property — visit and search of, 858–899; unlawful capture of, does not pass title to captor, Miller *v.* The Resolution (1), 899; neutral may charter and ship goods on armed belligerent vessel and is not responsible for resistance of belligerent vessel provided said neutral did not aid in armament or resistance, The Nereide, 884.

Neutral territory — equipment of vessels in, § 174, 692–720; neutrals should not permit their territory to be used for hostile purposes by either belligerent, § 173.

Neutral trade — neutrals may not carry on trade, such as coasting, from which they are excluded in peace, The Emanuel, 847; neutrals may not engage in trade from which they are excluded in peace, The Immanuel, 845; neutral citizens may send armed vessels to belligerent ports for sale if venture is *bona fide* commercial transaction, The Santissima Trinidad, 701.

Neutral waters — captures in, 684–691; capture in, illegal, The Anna, 684; capture of vessels in, § 173; capture in, illegal, but only neutral has right to complain, Commodore Stuart's case, 910; capture in, illegal, The Twee Gebroeders, 687; capture in, unlawful, The Florida, 690; capture in, good as between enemies, although rights of neutral are violated; captured vessel beginning attack forfeits claim to protection, The Anne, 688.

Neutralitet, The — carriage of contraband does not as a rule involve confiscation of ship, 767.

Neutrality — violated by fitting out vessel in aid of unrecognized insurgent communities or insurgents, The Three Friends, 748; neutral ports may not be used for building, equipping, or base of supplies for either belligerent, The Alabama Claims, 713; vessel built in United States subsequently sold or sent as commercial venture not violation of neutrality laws, United States *v.* Meteor, 711; fitting out in neutral port to cruise against belligerent is violation of neutrality laws, United States *v.* Quincy, 706.

Neutrality act of United States, § 174; 692. British Foreign Enlistment Act, § 174; 693.

Neutralized states, § 14; *see also* States.

Neutrals — relations between, and belligerents, historical sketch of the subject, 172; may not engage in a trade during war from which they were excluded in time of peace, § 184.

New Orleans *v.* Abbagnato — held New Orleans not responsible for injuries to foreigners by mob violence, 320; incorrectly held that United States government is not responsible therefor, 328–329 n.

New Orleans Mob (1891), § 74; 328–329 n.

New Orleans Riot (1851), § 74; 327 n.

New York Life Insurance Co. *v.* Stathem — executory contracts, if time is material and of essence, are annulled by war; life insurance policies are of this character, but assured is entitled to equitable value of policy at time of outbreak of war, 512.

(La) Ninfa — award under arbitration treaty has force of law, 443.
Non-combatants — who are, § 121.
Nuncio, § 95; *see* Diplomatic agents.

Obligation of treaties, *see* Treaties.
Occupation — as a mode of acquiring territory, § 35.
Occupation, *de facto* and constructive, § 165.
Occupation, law of — tendency to change, § 37; Berlin Conference, 1885, § 37.
Occupation, military — general character of the right and jurisdiction of an invader over territory occupied by his armies, old theories, modern views, § 163; relation of the territory occupied to the government of the invader, to that of the state invaded, § 164; American port in occupation of British forces is British port during such occupation, and goods imported during such occupation not liable, after evacuation, to American duty, United States *v.* Rice, 655; goods imported into United States from Mexico during American occupation thereof, subject to duty as imported from foreign country, Fleming *v.* Page, 659; neither President nor inferior executive officer can establish prize court in territory occupied by American troops, Jecker *v.* Montgomery, 664; during civil war President, as Commander-in-chief, may establish provisional courts in occupied districts, The Grapeshot, 666 n.
Occupier — right of, over the persons of the territory occupied, — "War Rebel," § 166.
Ocean, The — merchandise shipped by land or inland navigation from blockaded port to a port not blockaded, not liable to confiscation for breach of blockade, 819.
Oddy *v.* Bovill — judgment of prize court in country of ally passes title, 924.
Offences — committed abroad, jurisdiction of, 291–304.
Offences, political, *see* Political offences.
Olinde Rodrigues, The — blockade, to be binding, must be effective; presence of a single cruiser held sufficient, 835.
Oregon Territory, § 34.
Orozembo, The — carriage of military persons in neutral vessel subjects vessel to confiscation, 786.

Pacific, blockade, § 115; *see also* Blockade.
Pacifico, Don, § 115: *see* Don Pacifico.
Packet de Bilboa, The, *see* De Bilboa Packet, The.
Panaghia Rhomba, The — master is agent for cargo as well as ship, therefore attempt of master to enter blockaded port affects cargo, 800.
Panama, The — mail steamship not exempt from capture by law of nations, 788.
Panama Canal, § 50.
Paquette Habana, The — international law is part of municipal law of the United States, 19.
Parkinson *v.* Potter — diplomatic agent exempt from suit, 192.

Parlement Belge, The — public ship, other than ship of war, exempt from civil and criminal jurisdiction of foreign port, 220.

Parole, § 124.

Partnership — the civil war did not of itself dissolve partnerships between citizens of the North and South; dissolution was effected by President's proclamation of Aug. 16, 1861, Matthews *v.* McStea, 508: existing between citizens of belligerent states dissolved by outbreak of war: notice of dissolution unnecessary, Griswold *v.* Waddington, 504.

Patrixent, The — held that the hostage must first be shown to be detained or dead before action can be maintained against master or owner, 569.

Peace — capture made after declaration of, invalid, Bain *v.* Speedwell, 675; The Mentor, 676: The Schooner John, 677; rights of claimant upon declaration of, revived unless property condemned or forfeited, Neustra Señora de los Dolores, 681; effect of treaties of, § 169.

Perkins *v.* Rogers — summary of the law of nations on trade with enemy, 554.

Peterhoff, The — definition and kinds of contraband, 760.

Pious Fund Case, The — first decision of the Permanent Court of Arbitration, 449 n.

Piracy, 13; 345–369; opinion of Sir Leoline Jenkins, § 80; 345; definition and character of, *jure gentium*, § 80; may rebels and insurgents be regarded as pirates? § 81; by municipal law, § 81; slave trade is not piracy, *jure gentium*, § 82; Le Louis, 352.

Political department — recognizes existence of a state, 37–44.

Political offences — not subject to extradition, *In re* Castioni, 285, and 293–294 n.

Postliminium, in international law, § 170.

Potts *v.* Bell — trade with the enemy without license held void at common law, 525.

Pre-emption in matter of contraband, 775, 776 n.

Prescription — gives valid title to territory by the rules of international law, § 38.

President — of United States may not be made defendant in suit, Prioleau *v.* United States and Johnson, 173.

Prioleau *v.* United States and Johnson — though President could not be made defendant to a suit, proceedings stayed until answer of United States put in, 173.

Prisoners of war — who may be taken prisoners? treatment, parole, exchange, ransom, § 124.

Private contracts, 498–520.

Privateers, § 123; definition and nature of, 900, 901 n.

Prize Cases, The — civil war exists, is not declared, 475; property of persons residing within Confederate States during civil war, and engaged in commerce upon the sea, is enemy property and subject to capture, 601.

Prize courts — constitution of, in different countries, § 191; principles and practice of, § 192; they are courts of the captor's country, § 193; of the Confederacy; on land and on board ships, § 194; property when condemned need not be within jurisdiction of, 925 n.; of Confederate States did not pass title, The Lilla, 62 n.; Captain Semmes' procedure, 932 n.;

decision of, binds parties thereto, but does not estop government: it may proceed diplomatically against country of prize court for failure or miscarriage of justice, Cushing, Adm'r, *v.* United States, 929; judgment of, conclusive on points necessarily involved and clearly upon face of sentence, Dalgleish *v.* Hodgson, 926; of ally passes title, Oddy *v.* Bovill, 924; judgment of, in neutral country, does not change title, The Flad Oyen, 919; capture vests title in captor's country; title only passes to individual captor by condemnation in prize court of captor's country; capture in neutral waters illegal, but only neutral has right to complain, Commodore Stewart's case, 910; judicial proceeding in prize court necessary to pass title; evidence required for condemnation comes, in first instance, from ship and its papers, Miller *v.* The Resolution (2), 906; and 909 n.

Proclamations — in civil wars, § 168.

Property — in form of dividend arising from contract made before war, held not liable to confiscation, *Ex parte* Boussmaker, 494; state's title to, § 31.

Property of enemy — within the territory and debts due the enemy, 481–497; *see also* Enemy property.

Property, private — in form of debts due enemy held not confiscable by usage of nations, 496.

Property, sale of — within Northern lines, held valid after publication of notice to parties within Confederate lines, De Jarnett *v.* De Giversville, 542; and 545 n.

Protector, The — date of beginning and ending of civil war, 682.

Protectorates — protected states, § 14; *see also* States.

Protectorates — over semi-civilized peoples, "Spheres of Influence." § 43.

Public ships — immunities of, 208–225; other than ships of war, exempt from civil and criminal jurisdiction of foreign port, The Parlement Belge, 220; other than men-of-war, exempt from process in foreign ports, § 57.

Queen *v.* Keyn — in absence of statute, English court refused to take jurisdiction of offence against English subject committed by foreigner on foreign merchant vessel (The Franconia) within three-mile limit, 154; and note to case.

Ransom bills and permissible trading, 566–585.

Ransom bills — who may sue thereon? The Charming Nancy, 568; permissible trading with the enemy, Cornu *v.* Blackburne, 566; ransom contracts, ransom bill, safe conduct constitute exceptions to the rule against trading with the enemy, § 145; held lawful contract. Goodrich *v.* Gordon, 571; should first be shown that hostage was detained or dead before suit could be maintained against master or owner, The Patrixent, 569.

Ransoms, § 146.

Rapid, The — American citizen may not send vessel to enemy country after outbreak of war to bring away property, 557; *Ib.*, carriage of despatches to enemy generally involves confiscation of ship; loss of time and expenses only punishment if master not taxed with knowledge, 782.

Ratification of treaties, tacit and express, § 103.
Recapture, rescue, 649–654; by law of England is law of reciprocity; question of recapture and salvage considered, The Santa Cruz, 649; recapture and vesting of title to recaptured property in captor, § 157.
Recognition — methods of, § 19; The Congo State, § 19; of belligereney, § 24; have belligerent communities any legal right to, by sovereign states? § 25; forms of, § 25; of independence, J. Q. Adams on, 44–45 n.; when is recognition by third states of a new state claiming independence proper? § 18; of the existence of a state, 37.
Red-Cross Society, § 125.
Regina *v.* Anderson — an American citizen on British vessel on high seas subject to jurisdiction of Great Britain, 331.
Regina *v.* Lesley — British vessel in Chilian waters subject to Chilian jurisdiction; on the high seas such vessel subject to British jurisdiction; Chilian prisoners may therefore bring action for false imprisonment on arrival of vessel in British port, 337.
Reliance, The — United States courts may grant salvage for rescue of foreign vessel on the high seas, 230.
Reprisals — 451–459; definition and nature of, The Nereide, 451; Gray, Adm'r, *v.* United States, 452; reprisals, retorsion, pacific blockade, § 115.
Republic — may sue in own name, 175.
Republic of Honduras *v.* Soto — state is a moral person, 24.
Republic of Mexico *v.* Arrangoiz — foreign state or sovereign may sue in state or federal courts, 170.
Requisitions — and contributions in land wars, will they be resorted to in maritime wars? § 161.
Res ancipitis usus, § 179.
Rescue by neutrals, § 158.
Retorsion, definition and nature of, 459 n.; § 115.
Rivers — as boundaries, Handly's Lessee *v.* Anthony, 116; effect of avulsion and accretion on boundaries, Cooley *v.* Golden, 129; middle or main channel of, Buttenuth *v.* St. Louis Bridge Co., 121; navigation of, § 42.
Rivers, navigation of, § 42.
Ross, *In re* — consular jurisdiction in foreign country exists only by treaty, 238.
Rule of the war of 1756, § 184.

St. Lawrence, The — held that American citizen may not bring back property from enemy's country eleven months after outbreak of war, 559.
St. Lawrence — navigation of the, § 42.
Sale of arms to France, § 176; 747 n.
Sally, The — merchandise shipped to become property of enemy on arrival condemned as enemy's property if taken *in transitu;* capture considered delivery, 607.
Salvador, The — British vessel fitted out in aid of insurgents liable under British foreign enlistment act, 744.
Salvage, § 157; recapture, when does title to recaptured property vest in the

captor? § 157; not allowed in neutral property recaptured or rescued from enemy unless such property is really exposed to condemnation, The Carlotta, 650; and 654–656 n.; allowed to ship's master and boy on rescue of vessel from enemy, The Beaver, 653; property captured but abandoned by enemy, rescued by neutral, liable for salvage, The Mary Ford, 642; United States courts may grant, for rescue of foreign vessel on the high seas, The Reliance, 230.

San Jose Indiano — title to goods *in transitu* and stoppage *in transitu*, 614.

Santa Cruz, The — in considering questions of recapture and salvage, held that law of England on recapture of property of allies is the law of reciprocity, 649.

Santissima Trinidad, The — neutral citizens may send armed vessels to belligerent ports for sale if venture is *bona fide* commercial transaction, 701.

Sapphire, The — deposition or change of sovereign does not affect or abate suit. 174.

Schooner Exchange *v.* McFaddon — ships of war exempt from civil and criminal jurisdiction of foreign port, 208.

Schooner John, The — capture after declaration of peace, invalid, 677.

Scotia, The — courts take judicial notice of international law, 17.

Sea Lion, The — in the United States by act of Congress only. President authorized to grant license, 531.

Seals, protection of, § 189.

Search, Right of — resistance to search, ground for condemnation, except when resistance is to extreme and outrageous violence, The Ship Rose *v.* United States, 879; *see* Visit and search.

Seas — Marginal Seas — subject to territorial jurisdiction of state, Queen *v.* Keyn, 154: and 169 n.

Self-defence, acts of state in, § 73; *see* Extraterritorial acts by state in self-defence.

Semi-sovereign states — The Charkieh, 48.

Semmes, Captain — procedure of, in "prize court," 932.

Servitudes in international law, § 41.

Seton *v.* Low — neutral may engage in trade of contraband articles; an insurance policy effected on such goods is valid, 778.

Ship Rose *v.* United States — resistance to search, ground for condemnation, except where resistance is to extreme and outrageous violence, 879.

Ships of war — exempt from civil and criminal jurisdiction of foreign port, The Schooner Exchange *v.* McFaddon, 208; The Constitution, 118; *see also* Asylum.

Sick — care of, and wounded in war, § 125.

Slave trade — is not piracy, *jure genitum*, § 82; right of visit and search in, § 189.

Slaves — refusal to surrender, or to deliver, escaping to man-of-war in foreign port, held not actionable, Forbes *v.* Cochrane, 258.

Small's Adm'r *v.* Lumpkin's Ex'x — agent in enemy country, if appointed before war, may transact business for principal, 538.

Society for the Propagation of Gospel *v.* Wheeler — treaty *in rem* suspended, not extinguished by war, 428.

Soil of enemy country, produce of, § 150.

Sovereigns — rights, privileges, and immunities of, 170-189; § 52; deposition of, does not abate suit, The Sapphire, 178; domestic or foreign, may not be sued without consent, Beer *v.* Arkansas, 186; foreign, may not be sued, De Haber *v.* Queen of Portugal, 180; Vavasseur *v.* Krupp, 182; may sue in courts of foreign state, Mexico *v.* Arrangoiz, 170; may sue in courts of foreign state, § 51; are exempt in (1) their persons, (2) in their official representatives, and (3) in their property from the jurisdiction of foreign courts of law, § 52.

Sovereignty, change of — effect of, upon public rights and obligations, § 20; Kent's opinion, 96 n.; effect of, upon laws, § 22; 104-116; effect of, upon private rights, § 21; United States *v.* Percheman, 95; United States *v.* Repentigny, 98; effect of, on public rights and obligations, United States *v.* Prioleau, 85; United States *v.* Smith, 89.

Spies, § 129.

State *v.* Patterson — in interstate rendition the surrendered fugitive triable for crime other than that for which he was surrendered, 283.

State *v.* Wyckoff — crime committed in New York, not punishable in New Jersey, 296; and 300 n.; 301 n.

State — definition and characteristics of, 36 n.; kinds of, The Helena, 45; definition of, Yrisarri *v.* Clement, 23; definition of sovereign state, Texas *v.* White, 25; identity of, unaffected by internal changes, Keith *v.* Clark, § 12; 28; definition of states of American Union, Texas *v.* White, 25; as a moral person, Honduras *v.* Soto, 24; title to property, § 31; rivers of a, 116-132; effect of the recognition of a new state by the parent state, and by third states, § 17.

States — definition and nature of sovereign, § 10; sovereign, are the subjects or persons of international law, § 9; distinction between internal and external sovereignty of, § 11; fundamental rights and duties of, § 13; classification of, "Centralized states," "Personal Union," "Real Union" (Bundesstaat), "Confederate Union," (Staatenbund), Protected state, Neutralized states, § 14; equality of, § 15; date of the commencement of, § 16; *de jure* and *de facto*, Thorington *v.* Smith, 53; acts of military commander in *de facto* or *de jure* states, Underhill *v.* Hernandez, 62.

Statute of limitations ceases to run during war, Hanger *v.* Abbott, 500; § 135.

Stephen Hart, The — doctrine of continuous voyages applied in American civil war, 852.

Stewart, Case of Commodore — capture vests title in captor's country; title only passes to individual captor by condemnation in prize court of captor's country; capture in neutral waters illegal, but only neutral has right to complain, 910.

Straits and lakes — United States *v.* Rodgers, 132; bodies of water more than six miles wide, § 49 a.

Suez Canal, § 50.

Sutton *v.* Sutton — treaty *in rem* suspended, not extinguished by war, 427.

Terlinden *v.* Ames — treaty held not extinguished by absorption of one of parties thereto, 436.

Terræ dominium finitur ubi finitur armorum vis, § 48.

Territorial property of a state, § 30.

Territorial waters — history of attempts to appropriate the seas, or portions of them; contests between *mare clausum* and *mare liberum*, § 47; origin of the rule limiting the territorial right of a state in the sea to a marine league from the shore; "*Terræ dominium finitur ubi finitur armorum vis*," § 48; bodies of water more than six miles wide, § 49.

Territoriality of merchant vessels, § 76.

Territory — acquisition of, by prescription, Rhode Island *v.* Massachusetts; Virginia *v.* Tennessee, 74 n.; acquisition of, Harcourt *v.* Gaillard, 70; acquisition by "alluvium and increment," The Anna, 74 n.; modes of acquiring, § 32; title to, based on discovery, § 33; title to, based on prior discovery of the coast and mouths of rivers, upon occupation, exploration, and contiguity, § 34.

Teutonia, The — war may exist *de facto* without declaration, 471.

Texan bonds, 94–95 n.

Thompson *v.* Powles — recognition of the existence of a state, 37; *Ib.*, recognition of statehood, function of political department, 37.

Thorington *v.* Smith — definition and nature of sovereign states, *de facto* and *de jure*; Confederate states held entitled to rights and privileges of *de facto* states, 53.

Three Friends, The — fitting out vessel in aid of unrecognized insurgent communities or insurgents held violation of neutrality laws, 748.

Three-mile zone, § 48.

Title acquired by discovery and occupation, § 35.

Tousig's Case — an unnaturalized foreigner, residing in United States, not entitled to protection if he return to his home country, 401 n.

Trade — license to, § 146; house of, takes national character of country in which it is established, § 149; with enemy, is wholly interdicted; in all cases illegal, unless under license of the state, § 137; summary of the law of nations on trade with enemy, Perkins *v.* Rogers, 554; with the enemy, 521–556.

Trade with the enemy, 521–556; *see also* Enemy, trade of; Enemy property.

Transfer *in transitu*, *see Transitu*, transfer *in*.

Transit, ownership of goods in, 607–615.

Transitu, capture *in* — goods shipped to become property of enemy on arrival, condemned, The Anna Catharina, 612; title to goods *in transitu* and stoppage *in transitu*, San José Indiano, 614; goods shipped in time of war, or in contemplation thereof, held to belong to consignee; if consignee is enemy, property condemned, The Packet de Bilboa, § 151; 609; merchandise, shipped to become property of enemy on arrival, condemned as enemy's property if taken *in transitu*; capture considered delivery, The Sally, 607.

Transitu, stoppage *in*, § 152.

Transitu, transfer *in*, 616–628; § 152; *bona fide* transfer of property not illegal, but colorable or fraudulent transfer *in transitu* clearly so, The Vrow Margaretha, 616; colorable transfer of enemy property does not affect liability

thereof to capture, The Beneto Estengen, 621; contract in contemplation of war or transfer of colonial produce *in transitu* illegal, The Jan Frederick, 618; property may not change character in transit nor does neutrality of shipper protect property consigned for delivery to enemy port, The Ship Ann Green, 620.

Treaties — nature and kinds of, § 101; kind of, not subjects of international law, § 102; forms of, tacit and express ratification, § 103; interpretation of, § 104; conflict between different, § 105; of guarantee, § 106; legislation necessary to carry into effect, § 107; treaty dates from signing, not from date of ratification, § 108; Haver *v.* Yaker, 420; Davis *v.* Police Jury, 421 n.; obligations of, test of voidability, § 109; most favored nation clause in commercial, § 110; extinction and renewal of, § 111; the law of the land, 412–449; as law of the land, subject to constitutional limitations, Geofroy *v.* Riggs, 413; as law of the land, treaty takes precedence over state statute, Wunderle *v.* Wunderle, 414; not extinguished by absorption of one of parties thereto. Terlinden *v.* Ames, 436; superseded by subsequent treaty or act of Congress inconsistent therewith, Whitney *v.* Robertson, 422; *in rem*, suspended, not extinguished by war, Sutton *v.* Sutton, 427; Society for Propagation of Gospel *v.* Wheeler, 428; other than *in rem* extinguished by war, Hooper, Adm'r, *v.* United States, 433; effect of war upon, between belligerent states, § 136; of peace, § 168; effect of treaties of peace in settling general rights and obligations, § 169.

Trent, The — enemy subjects not belonging to armed or naval forces, not liable to capture in neutral transport, 788 n.

Trimble's Case — states do not, as a rule, surrender their own citizens, 293 n.

Triquet *v.* Bath — international law part of common law, 6; *Ib.*, an interpretation of the Statute of Anne, 6.

Troops, transit of, § 173.

Truce, flags of, § 146.

Truces, § 146.

Twee Gebroeders, The — capture within neutral waters illegal, 687.

Underhill *v.* Hernandez — consideration of *de facto* and *de jure* states; military commander representing a *de facto* government in the prosecution of war not civilly liable for his actions, 62.

United States *v.* The Active — War — Definition, object, rights acquired by, 464.

United States *v.* Ambrose Light — unrecognized insurgents (wrongly) held to be pirates, 346.

United States *v.* Davis — crime committed within jurisdiction of foreign country not triable in United States, 294.

United States *v.* Diekelman — merchant ships in foreign ports subject in all respects to jurisdiction thereof, 264; and 253–275 n.

United States *v.* Guinet — held unlawful for belligerents to arm vessels within neutral port, 695.

United States *v.* Jeffers — asylum does not exist in legations, 256; exception in Central and Southern American Republics, 257–258 n.

United States *v.* Kagama — Indians born within United States controlled by treaties or acts of Congress; states have no control over tribal Indians within their boundaries, 404.

United States *v.* The Meteor — vessel built in United States and sent or sold as commercial venture to belligerents not violation of neutrality laws, 711.

United States *v.* Moreno — conquest or cession of territory works no change in private titles to land, 666.

United States *v.* Percheman — title to private property unaffected by cession of territory, 95.

United States *v.* Peters — vessels of war are not amenable to neutral nations for violation of sovereignty thereof, 697.

United States *v.* Prioleau — upon end of civil war in 1865 title to public property of Confederate government vested immediately in government of United States, 85.

United States *v.* Quincy — vessel may be built in United States, but if fitted out in foreign port, neutrality laws of United States not violated, 706.

United States *v.* Rauscher — a duty to extradite exists solely under treaty, and fugitive triable only for crime for which he was extradited, 274.

United States *v.* Repentigny — on conquest and consequent change of sovereignty, inhabitants who do not remain and become citizens of conqueror deprived of protection to themselves and property unless secured by treaty. If provided by treaty that former inhabitants adhering to their vanquished sovereign may sell property to certain class of persons and within time specified, failure to comply with treaty by so selling forfeits or abandons property to conqueror, 98.

United States *v.* Rice — American port in occupation of British forces is British port during such occupation, and goods imported during such occupation not liable, after evacuation, to American duty, 655.

United States *v.* Rodgers — rivers, sounds, straits, connecting high seas, are themselves high seas, 132.

United States *v.* Smiley — crime committed beyond the jurisdiction of United States not punishable in United States, 302.

United States *v.* Smith — upon suppression of insurrection, as in the case of the Confederate States, the public rights and obligations of the *de facto* (Confederate States), vest immediately in the *de jure* government (United States), 89.

United States *v.* Smith — piracy, 13.

United States *v.* Texas — definition and nature of sovereign states of the Union, 76.

United States *v.* Trumbull — arms and ammunitions delivered to insurgent vessel in United States port, held not violation of United States neutrality laws, 731.

United States *v.* Wagner — republic may sue in its own name, and need neither have nor create officer to maintain suit on its behalf, 176.

Uti possidetis — as applied to territory; § 170.

Vavasseur *v.* Krupp — foreign sovereign may not be sued, and if in suit against his agents he adds his name so as later to be in position to claim property, he is not thereby subjected to jurisdiction of court, 182.

Venus, The — American citizen domiciled in enemy country, is enemy, and goods shipped before, but captured after, outbreak of war, lawful prize, 591.
Vessels, merchant, *see* Merchant vessels.
Vessels, *see* Ships of war; Free ships, Free goods; Neutral waters.
Virginius, The — state may seize vessel on the high seas in self-defence, 320 n., 322 n.
Visit and search — of neutral property, 858–899; right of, is a belligerent right to which neutrals are subject, § 187; formalities of the exercise of right of, false documents, spoliation papers, § 188; right of, in time of peace, § 189; vessel sailing under convoy is presumed to remain under convoy and therefore liable to capture; right of search implies right to use force if necessary in its execution, The Brig Sea Nymph, 869; vessel sailing under armed convoy to avoid visitation and search subject to condemnation, The Maria, 858, The Nancy, 861; held, *inter alia*, that vessel suspected of piracy may be visited, searched, and captured by any nation; right of search in other cases does not exist in peace; it is belligerent right, The Marianna Flora, 873.
Voluntary, not involuntary, trading with the enemy illegal, Crawford *v.* The William Penn, 575.
Volunteer navy, § 123.
Vrow Henrica, The — neutral carrier of enemy property generally allowed freight, in this case freight postponed to captor's law expenses, 629.
Vrow Margaretha, The — *bona fide* transfer of property not illegal, but colorable or fraudulent transfer *in transitu* clearly so. 616.

War — purpose and declaration, 464–480; definition, object, causes, kinds. § 118; definition, object, rights acquired by, United States *v.* The Active, 464; declaration of, without declaration, beginning of, § 117; civil, date of beginning and ending thereof, The Protector. 682; § 117; definition of, and kinds of, Dole *v.* Merchants' Marine Insurance Co., 470; perfect and imperfect kinds of, 471 n.; may exist *de facto* without declaration. The Teutonia, 471; instruments of, § 126; effects of, as between enemies, §§ 119, 120; property confiscable in, § 130; termination of. 675–683; § 168.
Ware *v.* Hylton — debts due the enemy legally may be, but from motives of policy generally are not confiscated, 485 n.
Ware *v.* Jones — contract made during civil war for sale of property, real or personal, to aid Confederate States held void, 517.
Washington — Three rules of, 714 n.
Whitney *v.* Robertson — treaty as law is superseded by subsequent treaty or act of Congress inconsistent therewith, 422.
Wildenhus' Case — merchant vessels subject, unless exempt by express treaty, to civil and criminal jurisdiction of foreign port; French rule otherwise, 225 (227–228).
William, The — by rule of 1756, neutrals may not trade directly between enemy and his colonies; touching at neutral port to avoid penalty not permitted, 848.
William Bagalay, The — duty of citizen to return home on outbreak of war, 565.

Williams' Case — at common law subject may not change allegiance without permission of state, 372.

Williams *v.* Marshall — license, to be a protection, must be complied substantially with, 530.

Wilson *v.* Blanco — diplomatic agent exempt from suit in third country, whether going to or returning from post, 206.

Wilson *v.* McNamee — merchant vessels of the United States on the high seas subject to jurisdiction of United States, 329.

Wolff *v.* Oxholm — private property in form of debts due enemy, held not confiscable by usage of nations, 496.

Wunderle *v.* Wunderle — treaty as law of the land takes precedence of state statute, 414.

Yrisarri *v.* Clement — definition, nature and constituent elements of statehood, 23.

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